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No.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

For fifty years, the agencies responsible for administering the Civil Service Retirement Act ("Retirement Act") computed the retirement annuities of postal substitutes (a large class of employees who were subject to call by the post office but were paid only for time actually worked) on the basis of the employee's average annual salary *rate* rather than the pay actually earned. In 1978, OPM abandoned this method by including in the computation only the employee's actual earnings, substantially reducing the retirement benefits of 113,000 employees. OPM so acted on the factual premise that the substitutes are no longer on call, a determination challenged by petitioner in this proceeding to review OPM's action.

The questions presented are:

1. Did the Court of Appeals exceed its power of judicial review as circumscribed by *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194, when, treating the "subject to call" issue litigated by the parties as a "mirage", the court affirmed the agency's action on the entirely different and inconsistent ground that, as construed by the court, the Retirement Act requires that the substitutes' annuities be based on their actual earnings even if they are, in fact, still subject to call?

2. Did the Court of Appeals err in so construing the Retirement Act, thereby overturning fifty years of "administrative practice, consistent and generally unchallenged", to which it gave no weight, contrary to *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 and its progeny?*

* The parties to this proceeding, in addition to those named in the caption are: Wilma M. Carter, Marjory E. Watson, Virginia G. Doss and the Office of Personnel Management and its Director, Donald J. Devine.

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OPINION BELOW

The Opinion of the Court of Appeals is reported at 707 F. 2d 548. It is reproduced at pp. 1a-35a of the separately bound Appendix to this petition ("App."). The Memorandum Opinion of the District Court is unreported. It is reproduced at App. 36a-46a.

JURISDICTION

The decision of the Court of Appeals and its Judgment (App. 50a) were issued on May 6, 1983. A timely petition for rehearing and rehearing en banc was denied on July 14, 1983 (App. 52a). On October 3, 1983 the Chief Justice entered an Order extending the time for filing this petition to December 11, 1983. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

This case involves the Civil Service Retirement Act as amended, 5 U.S.C. §§ 8331 *et seq.* (1976) (Supp. V, 1981), which is reproduced in pertinent part in the Statutory Appendix, pp. 1b-4b, *infra*.

STATEMENT OF THE CASE

Introduction

As the Court of Appeals said, "The past is truly prologue to this controversy" (App. 2a). It involves the legality of respondents' abandonment of the method used for over fifty years for calculating the retirement benefits of a large class of employees of the United States Postal Service ("USPS") known as "substitutes" or "PTF's" (part-time flexible employees). As the Court of Appeals also observed, "This change [in the method of computation] substantially reduce[s] the expected annuities of some 113,000 future retirees." (App. 2a). It was adopted by the Office of Personnel Management ("OPM")¹ at the behest of USPS on the view that there had been a substantial material change in the working conditions of the substitutes; that position has been challenged in this litigation by petitioner American Postal Workers Union ("APWU"), a labor organization representing approximately 65,000 of these substitutes (Complaint, ¶ 2).

The Court of Appeals did not resolve the foregoing factual controversy or direct a trial for that purpose. Rather, it sustained OPM's change on a ground not urged by any of the parties: The court held that the method for calculating the benefits of these employees had, for

¹ In 1978 OPM succeeded to all the rights and duties of the Civil Service Commission ("CSC") in administering the Retirement Act. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a) (2), (3), 92 Stat. 1111, 1224-25. (App. 6, n.3). Like the Court of Appeals, we will use "OPM" and "CSC" interchangeably.

fifty years, been based on a misinterpretation of the civil service retirement acts; it thereby reversed the uniform understanding of the affected employees, the employers (USPS and its predecessor the United States Post Office Department) and the agencies responsible for administering the civil service retirement system (OPM and its predecessors, the Civil Service Commission ("CSC") and the Secretary of the Interior).

In order to put the questions presented by this petition into context we shall describe the working conditions of these postal substitutes, the previously accepted method for calculating their retirement benefits, and the (highly informal) proceedings by which USPS prevailed upon OPM to change this practice. We shall then describe the instant litigation.

A. The Factual Background

1. Since the nineteenth century the Post Office has employed "substitutes" to do the work of absent employees, because a full complement of postal workers is required at all times to process and deliver mail on a daily basis (App. 3a-4a). In the Court of Appeals' words:

Postal substitutes were unique in that the time they actually worked was far less than the time during which they had to be available for work. Obviously, the Post Office could not efficiently hire a new worker each time a regular employee was absent on short notice. Thus, the Post Office maintained a pool of acceptable substitute employees, who actually worked only when needed to replace absent regular employees. [App. 4a]

Originally, substitutes were required to physically report for duty at the Post Office ("shape up") two or three times daily. By 1918 they were required to "shape up" in the morning, and wait for work all day and into the evening. By the 1940's, at least, the "shape up" had been eliminated, but the substitutes were required to be

available by telephone if needed to work on short notice (App. 8a). And, as the Court of Appeals recognized, after passage of the Postal Reorganization Act of 1970 ("PRA", codified at 39 U.S.C. §§ 101-5060 (1976, Supp. V, 1981)) the substitutes still had to be available to work on short notice (App. 8a-9a). The record shows this to be true even after OPM's challenged action in 1978 (J.A. 152-185).²

2. In 1920 Congress passed the first Civil Service Retirement Act, providing that any eligible employee in the classified civil service could receive an annuity based upon his or her years of federal service and average basic annual salary pay or compensation. Act of May 22, 1920, ch. 195, § 2, 41 Stat. 614, 615. The Commissioner of Pensions, under the direction of the Secretary of Interior, was charged with administration of the statute. § 4, *id.* at 616. Congress provided in the 1920 Retirement Act that in giving a substitute credit for service, the Secretary could include only the amount of time actually worked. § 3, *id.* at 616.³

In 1926, a Joint Committee of Congress heard testimony about the predicament of postal substitutes. They were paid a small hourly wage only when they actually worked, which was infrequent and unpredictable. Their income, therefore, was generally not enough to provide a decent living; yet they were unable to secure any additional employment because they had to be available for postal work at all times. It was suggested that substitutes be recompensed for these onerous employment conditions.⁴

² "J.A." refers to the Joint Appendix in the court below. The Postal Service's continuing practice is illustrated by the discharge of Bonnie Calentine because she had not been at home when called for work by the postmaster in 1979 (J.A. 180-183, 185).

³ The Civil Service Retirement Act: Joint Hearings Before the Senate and House Committees on Civil Service, 69th Cong., 1st Sess. 63, 66, 68 (1926).

⁴ Prior to the enactment of the Postal Reorganization Act of 1970 the Post Office Department employed individuals as substi-

The bill reported by the committee and passed by Congress amended the retirement law to require that a substitute's credited service for the computation of annuities include the entire period of employment as a substitute, regardless of the actual time worked. (Act of July 3, 1926, ch. 801, § 5, 44 Stat. 904, 907.)

The Secretary of Interior thereafter began computing substitutes' annuities on the basis of the employee's average annual salary rate rather than the pay actually earned—a practice which prevailed until the OPM decision at issue here. The exact time when this practice began is not known, and the Secretary apparently did not issue any formal explanation of his reasons therefor. The Secretary did in 1926 issue a formal decision that in the computation of service of substitute postal employees under this new provision, credit should be allowed from the date of the employee's original appointment and "mere failure to perform actual services will not be regarded as equivalent to leave of absence so long as they were *subject to call* for actual service." (*Computation of Service of Substitute Postal Employees*, 22 Decisions Relating to Pensions and Annuities 207 at 208, emphasis added (September 17, 1926)).

3. For over 50 years the retirement benefits of postal substitutes were calculated on the basis of their average annual salary rate. This was an important attraction for these employees, who as late as 1943 were receiving only 65 cents per hour when they worked, and nothing for the time that they were on call.⁵ On June 30, 1960, Postmaster General Summerfield wrote a lengthy letter to Chairman Jones of the Civil Service Commission, ask-

tute employees in two categories, "career substitutes" and "temporary substitutes". The former, but not the latter, were covered by the civil service retirement law.

⁵ See, *Classification and Compensation of Substitute Employees in the Postal Service*, Hearings on H.R. 2836, *et al.* before the House Committee on the Post Office and Post Roads, 78th Cong., 1st Sess., 10 (1954).

ing that the Commission no longer credit the substitutes for pay not actually earned (J.A. 197-201). The Commission did not act on this letter and the practice was retained.

In 1970, the PRA was passed, creating the United States Postal Service. Although the PRA removed postal employees from the competitive civil service, 39 U.S.C. § 1001, it provided that they would continue to be covered by the civil service retirement system, *id.* § 1005(d), and the method for computing the substitutes' annuities was not changed (see App. 6a). In July 1974 Congress amended the Civil Service Retirement Act and PRA to make the USPS liable for any unfunded liability attributable to a collective bargaining agreement or administrative action. Payments, however, were to be made over a 30-year period. P.L. 93-349, 88 Stat. 354, July 12, 1974, 5 U.S.C. §§ 8348(h)(1)-(2); 10005(d).

In 1977 the postal service undertook strenuous efforts to cause the CSC to change the method of computation to include only the substitutes' actual earnings. Following a March 11, 1977 letter from Postmaster General Bailar to Acting CSC Chairman Sheldon (J.A. 195-196) and a meeting in May, 1977 (see J.A. 27-29, 202), Deputy Postmaster General James V. P. Conway wrote a lengthy letter to Thomas A. Tinsley, Director of the CSC's Bureau of Retirement, Insurance and Occupational Health ("BRIOH") setting forth the postal service's position (J.A. 202-205).⁶ This letter was supplemented by one from Mr. Bailar of November 29, 1977 to Alan K. Campbell, then the Chairman of the CSC (J.A. 206-207). In each of these communications USPS stressed that the working conditions of the substitutes had materially

⁶ In that letter Conway stated, *inter alia*:

If you determine that you cannot initiate an administrative change of this nature, then the Postal Service proposes to adjust its method of certifying individual retirement records. [J.A. 204]

changed in that they were no longer subject to call, according to USPS (but see p. 4 and n.2, *supra*).

On January 12, 1978, the CSC issued an unpublished Minute (Minute 7) approving USPS' proposed change in the method for computation of benefits with respect to postal employees in third-class post offices. Minute 7 reasoned that "part-time flexible employees in third-class offices were no longer considered on call" and that "such employees [are] more properly classified as part-time employees assigned to regular schedules of less than 40 hours per week * * *" (App. 47a).

Despite the limited nature of Minute 7, however, the USPS immediately began to change employment records of *all* PTF's (in first and second—as well as third-class post offices) to credit them only for their actual earnings for purposes of retirement (J.A. 36-40, 144).

USPS' unilateral expansion of Minute 7 was adopted by OPM's subordinate body when BRIOH Letter No. 10-12, dated October 16, 1978, was issued internally to claims examiners (App. 48a). In that letter, Minute 7 was extended to PTF's in first- and second-class post offices, sweeping another 100,000 employees under the ruling (J.A. 143), and this decision was made effective with respect to employees who retired on or after February 11, 1978, the effective date of Minute 7. (App. 48a-49a).

Neither APWU nor individual affected employees were given notice that OPM was considering a change in the 50-year old practice of computing retirement benefits, or given the opportunity to comment thereon. (App. 6a, 34a).

B. The Proceedings Below

On March 26, 1979, APWU and three of its members brought suit in the United States District Court for the District of Columbia against USPS, OPM and the Director of OPM for injunctive and declaratory relief,

challenging the change in the computation method as violating the Due Process Clause of the Fifth Amendment to the United States Constitution, the Postal Reorganization Act, the Civil Service Retirement Act, and the Administrative Procedure Act ("APA"). The District Court (Penn, J.) granted summary judgment to the defendants (App. 36a-46a).

The Court of Appeals affirmed. For present purposes it is necessary to describe only the Court's reasoning in holding that "OPM's present PTF annuity computation method is a proper interpretation of the [Civil Service Retirement] Act." (App. 34a). After having concluded, in agreement with the District Court, that OPM's new rule was "interpretative" and therefore exempt from the informal rule-making provisions of the APA (App. 20a-25a), the Court "review[ed] the interpretative rule to determine its consistency with the governing statute and regulations." (App. 25a). The Court recognized that the "parties have framed their discussion largely in terms of whether OPM lawfully determined that PTF's are no longer 'subject to call,' and the single disputed factual issue in this case is whether PTF's are in fact no longer 'subject to call.'" (App. 25a). However, although both OPM and BRIOH had accepted the "subject to call" standard and had adopted the new practice solely on the basis of USPS' representations that the substitutes are no longer subject to call, the Court said that the "'subject to call' issue * * * is a mirage." (App. 26a). In the Court's view:

"Subject to call" is not a legislatively defined category that limits OPM's interpretation of the Act; rather, it is merely an umbrella term that describes the working conditions of employees whom OPM believes Congress intended to benefit through use of an enhanced "average pay" figure.

* * *

The parties' dispute over the nature of the present working conditions of PTF's and whether those

conditions render PTF's "subject to call" is therefore immaterial. Even if appellants could prove at trial that the working conditions of PTF's have not changed over the past twenty years and that PTF's are as available as appellants claim, this proof would at most undermine OPM's justification for the change in its interpretation. It would not affect the propriety of the interpretation itself, which is a pure question of law. [App. 26a, 27a]

The Court then determined on the basis of its independent inquiry—the parties not having briefed the issue—that OPM's "new computation formula is consistent with the plain meaning of the term 'average pay' in the Civil Service Retirement Act [and] with the Act's structure and purpose." (App. 34a). In so ruling, the Court gave no deference to the Secretary of Interior's original interpretation of the Act, or to the fact that it had been adhered to by successive administrators of the retirement system and relied on by affected employees for 50 years.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IMPORTANT BECAUSE IT HAS A SEVERELY ADVERSE IMPACT ON A LARGE CLASS OF FEDERAL EMPLOYEES.

The importance of the Court of Appeals' decision cannot be gainsaid. That decision approves a change in the calculation of retirement benefits which, in the Court's words, "substantially reduced the expected annuities of some 113,000 future retirees," thereby "threaten[ing] the employees' financial planning and economic security" (App. 2a, 34a).⁷ It likewise affects an undetermined num-

⁷ The precise impact of the change in the annuity formula will, of course, vary from employee to employee. But the record does give some indications of its magnitude. The District Court found that the annuity of Wilma M. Carter is cut from \$412 per month to \$251 per month (App. 39a-40a). Dorothy H. Swanson's annuity will be reduced from an anticipated \$565 per month to \$385 per month (J.A. 170-173). Jane E. Sheets' retirement "will amount to one-fourth of what it would have been" (J.A. 152A).

ber of employees in the Forest Service and elsewhere in government service who, as a high-level OPM official deposed, are similarly situated (J.A. 49-50). Moreover, because the decision admonishes government employees that administrative or federal action may upset retirement expectancies, no matter how firmly grounded in long-established practice, it jeopardizes a major objective of the retirement system—to attract and retain workers in federal service despite the monetary inducements offered by private employers (see p. 21, *infra*).

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT ESTABLISHING FUNDAMENTAL PRINCIPLES CONCERNING THE RELATIONSHIP BETWEEN THE ADMINISTRATIVE AGENCIES AND THE FEDERAL COURTS.

The serious adverse consequences to the many employees whom the decision below directly affects are the product of an opinion that contravenes two major principles of administrative law established by this Court. As we now show, the decision below (a) violates the proper relationship between administrative agencies and reviewing courts as set forth in *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194, and (b) gives no weight to the civil service agencies' 50-year old interpretation of the Retirement Act, contrary to the teachings of *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, and its progeny.

A. The Decision Below Is Inconsistent With *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194.

In *SEC v. Chenery Corp.*, 318 U.S. 80 ("*Chenery I*"), this Court "emphasized a simple but fundamental rule of law" (*SEC v. Chenery Corp.*, 332 U.S. 194, 196) ("*Chenery II*"). As reaffirmed in the latter case:

That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make,

must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency. [332 U.S. at 196]

The court below in this case honored the *Chenery* principle in the breach rather than in the observance. OPM (and BRIOH) adopted a new formula for computing the annuities for postal substitutes solely on the basis that due to changed circumstances they were no longer "subject to call". Yet the Court of Appeals, without passing on the merits of that rationale, affirmed the agency decision on the ground that, under the court's own interpretation of the Retirement Act, the new formula was correct whether or not the substitutes are in fact "subject to call". See pp. 8-9, *supra* and pp. 16-17, *infra*.

The Court of Appeals sought to justify its nonadherence to the requirements of *Chenery* on the basis that the doctrine does not apply to interpretative rules:

In contrast to agency decisions made pursuant to adjudication and legislative rulemaking, interpretative rules may be sustained on grounds other than those assigned by the agency. [App. 26a]

This was error. The Court of Appeals' limitation is not only unprecedented but unprincipled. For this Court has *not* excluded interpretative rules from the *Chenery* doctrine. And it is *not* for a lower court to do so in the first instance.⁸ It would therefore be inappropriate,

⁸ The Court of Appeals' only citation was, "See K. Davis, *Administrative Law Text*, § 16:07, at 329 (3d ed. 1972)" (App. 26a). It bespeaks no disrespect for academic scholarship to recognize that a treatise lacks the authority of a precedent in this Court. Moreover, in the cited section Professor Davis does not discuss interpretative

within the confines of a petition for certiorari, to do more than show, as can readily be done, that the distinction between interpretative rules and other agency decisions, though unquestionably significant for many purposes, is entirely irrelevant in the present context.

Under the APA the notice and comment requirement of legislative rulemaking is not applicable to interpretative rulemaking (see 5 U.S.C. § 553 and especially § 553 (b) (A)); however the *Chenery* principle has nothing to do with the procedures underlying the agency's action. The two types of rules are also viewed differently for purposes of judicial review. As explained in *Batterton v. Francis*, 432 U.S. 416: Ordinarily, administrative interpretations of statutory terms are given important but not controlling weight (*id.* at 424, referring to interpretative rules), whereas legislative rules "can be set aside only if the Secretary exceeded his statutory authority or if the regulation is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"

(or for that matter legislative) rulemaking. The particular passage to which the court refers appears to be the following:

[The *Chenery*] principle does not apply to functions which courts properly perform, such as *molding law*, *interpreting statutes*, interpreting findings, deciding whether findings are supported by substantial evidence, deciding whether the findings sufficiently support the order, determining the overall reasonableness of the action taken. [K. Davis, *op. cit. supra* at 329, emphasis added]

Professor Davis cited no decisions in support of this gloss on *Chenery*. If it was intended as a listing of "functions" to which the *Chenery* principle is wholly inapplicable (as the Court of Appeals appears to have thought), this limitation cuts far too deeply. The issue remanded in *Chenery I* required the SEC to "mold[] law" and interpret a statute, *viz.* the Public Utility Holding Company Act, although the agency's determination of that issue was, of course, subject to judicial review, which was undertaken in *Chenery II*. Thus, *Chenery* necessarily applies to "functions which the courts properly perform"; the doctrine requires that the agency have the first say but not that the agency have the final say, with respect to issues which the doctrine requires to be remanded for agency consideration.

5 U.S.C. §§ 706(a)(A), (C), (*id.* at 426). The important weight given interpretative rules respects the agency's responsibility and experience in administering the statute, which provides the agency with insight into the statute's meaning and the practical consequences of alternative constructions. The same is true with respect to interpretations rendered in the course of administrative adjudication; these likewise are entitled to "considerable deference" but do not bind the courts. *See, e.g., Bureau of Alcohol, Etc. v. Federal Labor Relations Auth., — U.S. —, 52 L.W. 4013, 4015 (Nov. 29, 1983).* *Chenery* was itself an instance of adjudication, and its doctrine indisputably applies to this class of administrative decisions, as the court below indeed acknowledged. There is no rational basis for requiring that the agency be given the initial opportunity to interpret a statute in such a proceeding, and for not requiring that opportunity where the agency has determined the rights of parties by way of interpretative rule rather than formal adjudication.

By engrafting a novel exception to the *Chenery* doctrine the Court of Appeals has assumed the power, denied it by *Chenery*, to decide this case on a ground different from and inconsistent with that adopted by the agency to which Congress gave responsibility for administering the Retirement Act. Such a major revision of what this Court has repeatedly held to be the proper relationship between administrative agencies and appellate courts plainly warrants review by this Court.

B. The Decision Below Is Inconsistent With *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, and Its Progeny.

1. Having determined, notwithstanding *Chenery*, to consider the OPM's new computation method on a ground entirely different from that on which the agency rested, the Court of Appeals compounded its error by substituting its own views of what the Civil Service Retirement

Act means for the 50-year old uniform construction placed on that Act by the responsible agencies. The decision below thereby contravened this Court's oft-repeated teaching "that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315. Because the "subject to call" practice is so longstanding, *Bankamerica Corp. v. United States*, — U.S. —, 103 S.Ct. 2266 ("*Bankamerica*"), decided June 8, 1983, after the opinion below issued, provides an especially instructive application of this principle.

It will be recalled that in *Bankamerica* the question presented was whether § 8 of the Clayton Act bars interlocking directorates between a bank and a competing insurance company. In answering this question in the negative, contrary to the position of the United States, the Court placed special reliance on the circumstances that no action to enforce § 8 against such interlocks had been taken in over 60 years after the Clayton Act became law. This Court said:

In rejecting the Government's present interpretation of Section 8, we by no means depart from our long-held policy of giving great weight to the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement, *e.g.*, *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210, 6 L.Ed. 603 (1827). But the Government does not come to this case with a consistent history of enforcing or attempting to enforce Section 8 in accord with what it urges now. On the contrary, for over 60 years, the Government made no attempt, either by filing suit or by seeking voluntary resignations, to apply Section 8 to interlocks between banks and non-banking corporations, even though interlocking directorates between banks and insurance companies were widespread and a matter of public record

throughout the period. We find it difficult to believe that the Department of Justice and the Federal Trade Commission, which share authority for enforcement of the Clayton Act, and the Congress, which oversees those agencies, would have overlooked or ignored the pervasive and open practice of interlocking directorates between banks and insurance companies had it been thought contrary to the law. [103 S.Ct. at 2271-2272, footnotes omitted]

Considering the Retirement Act in light of *Bankamerica*, it is especially significant that not only the OPM and its predecessors, but also USPS and the Post Office Department had recognized that the substitutes' annuities were to be determined on the basis of their average annual salary rate because they were subject to call. Postmaster General Summerfield's abortive 1960 request that the CSC revise the computation formula, and USPS' diligent and all-too-successful 1977 effort, demonstrate that the postal authorities were strongly motivated to urge a reinterpretation of the Retirement Act which would achieve that result if they could plausibly do so. Given their interest and resources, their failure even to contend that it is irrelevant whether the substitutes are subject to call confirms the soundness of the original construction of the Act, even as the failure of the antitrust enforcement authorities to invoke § 8 was of great significance in construing that provision. As the Court explained in *Bankamerica*:

"[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." [103 S.Ct. at 2272, quoting *FTC v. Bunte Brothers, Inc.*, 312 U.S. 349, 352]

Moreover, in *Bankamerica*, the Court was impressed by the fact "that for more than a half century literally thousands of citizens in the business world have served

as directors of both banks and insurance companies in reliance on what was universally perceived as plain statutory language." (103 S.Ct. at 2272-2273). For an almost equal period well in excess of a hundred thousand citizens accepted employment as postal substitutes though they were not paid for time spent waiting to be called for work; they did so in reliance on the government's unquestioned practice of computing their retirement annuities on the basis of their average annual rate of pay rather than their actual earnings.

"These citizens were reassured" (*id.* at 2273) by the fact that thousands of postal substitutes similarly situated had received and were receiving retirement benefits in accordance with this formula. Without deprecating in the slightest the interest of bank and insurance company directors in avoiding potential civil liability under the antitrust laws for conduct which was presumably lawful in light of the government's inaction (*id.*), we submit that the postal substitutes' reliance throughout their working lives that their retirement benefits would not be reduced by a novel statutory construction is worthy of at least equal respect. The Court of Appeals should not have transformed these employees' retirement expectancies into a teasing illusion by dismissing the long-settled understanding of the Retirement Act as "a mirage." (App. 26a). "Not lightly vacated is the verdict of quiescent years." *Coler v. Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884 (Cardozo, J.), *aff'd*, 280 U.S. 218.

2. The Court of Appeals went astray at the very outset of its analysis when it stated that "In essence we are faced with a choice between two conflicting interpretations of the Act made by the agency charged with its administration." (App. 27a). Although the result which OPM reached conflicts with the prior practice, the agency adhered to the prior *interpretation* of the Retirement Act. As already discussed (pp. 7, 8, *supra*), OPM

adopted the new method of computation not because it had discarded the established "subject to call" standard, but because it determined (on the basis of USPS' representations) that the substitutes were no longer subject to call. What had changed was not OPM's interpretation of the law, but its perception of the facts.⁹

In setting the two assertedly conflicting interpretations of the Act against each other, and thereupon giving no weight to either in determining what the statute means (App. 27a), the court below erred. The premise from which it should have proceeded is that the agencies' interpretation of the statute—that is, of the legal standard it establishes—has been uniform and longstanding, and as such is entitled to great weight. The utility of the *Norwegian Nitrogen* principle will be severely diminished if any difference in outcome—no matter what the responsible agency's reasons therefor may be—is treated as a change in statutory interpretation by that agency.

The court further denigrated the *Norwegian Nitrogen* principle by dismissing it on the assumption that the Secretary of Interior's original computation formula was not "contemporaneous" with the Civil Service Retirement Act. (App. 27a-28a, n.9). "[C]onsistent and generally unchallenged practice" is entitled to deference whenever rendered. See 288 U.S. at 315, quoted at p. 14, *supra*. Justice Cardozo added that a "practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." (288 U.S. at 315, emphasis added.) Indeed, the Secretary's original formula is entitled to that "peculiar weight": "contemporaneous" does not mean

⁹ It was precisely for this reason that the parties in the Court of Appeals "framed their discussions largely in terms of whether OPM lawfully determined that PTF's are no longer 'subject to call,' and the single disputed factual issue in this case [was] whether PTF's are in fact no longer 'subject to call.'" (App. 25a).

"instantaneous", and even under the Court of Appeals' assumption, he adopted the formula in 1928, two years after the amendment to the Act which provided that postal substitutes should receive service credit as if they worked fulltime.¹⁰

3. Appropriate deference to consistent and generally unchallenged administrative practice does not, of course, require judicial acceptance where the statutory language or other legislative materials point unmistakably to a contrary interpretation. But no such clear guidance is provided by the indicia of Congressional intent relied on by the Court of Appeals.

According to the court below, the "plain language of the Act makes it clear that Congress did not intend for a PTF's 'average pay' to include pay which the PTF

¹⁰ The court speculated that the Secretary's action was based on a Comptroller General opinion construing the statutory limitation on double compensation of government employees as it affected postal substitutes (App. 27a-28a, n.9; *id.* 5a, 7a, 22a). The court apparently overlooked the Secretary's own published 1926 decision concerning service credit for postal substitutes which is nowhere mentioned in the court's opinion. In its August 4, 1977 letter to BRIOH, see p. 6, *supra*, where it obviously sought to put its position in the best possible light, USPS expressed the belief that the Secretary's action was based "on the principle that an employee who received credit for salary as if fulltime [under the 1926 amendment], should receive credit for salary in the same manner" (J.A. 202-203). USPS added: "In addition, consideration may have been given to the theory expressed by the Comptroller General * * * that a postal substitute's per annum rate was to be determined by multiplying the hourly rate by the number of hours in a service year." (J.A. 203, footnote omitted). While the court found no justification for reliance on that decision, we submit that it would not detract from the soundness of the Secretary's action even if he did take the Comptroller's decision into account by harmonizing the treatment of postal substitutes' salaries under the two statutes. It would indeed have been harsh—and contrary to the spirit of the 1926 amendment—to utilize the per annum earnings rate for purposes of the double compensation prohibition, thereby reducing the amount which the substitutes could lawfully earn, and yet use actual earnings as the basis for calculating their retirement benefits.

never earned—neither on the basis of the employee's being 'subject to call' nor on any other basis." (App. 28a-29a). This meaning has not been so clear to those who have previously dealt with this language, and we submit that the Court of Appeals' certitude was entirely unjustified. The key to the matter is that "average pay", which is the basis for computing the annuity (5 U.S.C. § 8339(a) (1976)), is defined as "the largest annual *rate* resulting from averaging an employee's or Member's *rates of basic pay* in effect over any 3 consecutive years of creditable service." 5 U.S.C. § 8331(4) (1976) (emphasis added). A "rate" of pay is that pay which an employee is entitled to receive over a specified period of time (for example, a year) if he works during the entire period; it is not necessarily the amount of pay he actually receives.¹¹ Although the Court of Appeals attached great, if not decisive importance to the elaborately demonstrated proposition that "basic pay" means "pay actually earned" and "money actually received" (App. 29a-30a), this is quite beside the point, since the statute provides that annuities are to be calculated according to the employees' "rates of base pay." In short, the "plain language of the Act" (App. 28a) does not require the Court of Appeals' construction, and therefore cannot justify overturning the longstanding administrative interpretation.

Two of the further indicia on which the court relied are, at best, sufficiently debatable that they do not war-

¹¹ In discussing the computation of annuities, OPM's Federal Personnel Manual states:

d. Basic pay rate to be used. (1) *In general.* In computing a high-3 average pay, the rate of annual basic pay—not the pay actually received by the employee—is to be used except where noted below. The basic pay rate is that fixed by applicable law or regulation. [Federal Personnel Manual, 831-1 Inst. 31 (Sept. 21, 1981) p. 60]

The exclusions from basic pay "noted below" are certain pay differentials and allowances not relevant here.

rant disregard of the agency's construction.¹² And one of the court's points is plainly without merit because it seriously misconceives the purposes of the latest major revisions of the Retirement Act, in 1956: The court asserted that because the original method provides some postal substitutes with retirement annuities greater than their earnings, it subverted the Congressional intent. The court observed that "one of the primary purposes of the retirement act is to encourage workers to remain in the federal service." (App. 32a). Senator Johnston of South Carolina, the Chairman of the Post Office and Civil Service Committee, and manager of the bill which became the

¹² The court inferred from the fact that the Act makes special provision for postal substitutes with respect to service credits, but not with respect to the earnings component, that Congress intended their annuities to be calculated only on the basis of actual earnings (App. 31a). While this is a plausible inference, it was likewise plausible for the Secretary of Interior to reason, as he apparently did, that Congress' intent to provide meaningful retirement benefits to "substitutes who had to remain at the post office all day awaiting work" (*id.*) would be better served if their annuity did not depend on how much work they actually obtained. The *Norwegian Nitrogen* principle recognizes that an administrator charged with implementing a new statute is in a far better position to make such a judgment concerning Congressional intent than is a court viewing a blank legislative record, decades later.

The court below derived from Congress' concern about the costs of the retirement system and its adoption of a "*partially* contributory system" (*id.*, emphasis added) a "principle" of "proportionality between employees' contributions and retirement benefits" (App. 31a-32a). But while the system embodies a certain element of "proportionality" between employees' contributions and benefits, it is far from pervasive. 5 U.S.C. § 8339 provides that the annuity is to be calculated by averaging the employee's three highest years, thereby *disregarding* the amount of the employee's earning during the other years of his credited service, and does not rely on his contributions as such at any time. The fact that the agencies responsible for the financial integrity of the retirement fund accepted the "pre-1978 method of [postal substitutes'] annuity compensation" for fifty years evidences their disagreement with the court's view that this method "violates the basic principle underlying the Act." (App. 32a).

1956 revisions of the Act, made clear that Congress' objective was "to encourage workers to remain in the federal service" *rather than to transfer to private employment*.¹³ That policy can only be subverted by the demoralizing effect of the decision below on present and potential civil service employees; they will learn from what has happened to these 113,000 postal substitutes that retirement expectations, based on historic practice, can be dashed by administrative or judicial action.¹⁴ Senator Johnston's explanation demonstrates also that one of the ends which Congress sought to achieve by improving retirement benefits in the 1956 revision was to induce

¹³ Senator Johnston said, in the passage cited by the Court:

If the bill should be passed and enacted into law it will, in my opinion, mean much to the Federal Government and employees who work for the Federal Government, because it will provide a greater incentive for Government employees to remain in Government service. One thing that has hindered the departments in the past has been that after a person has entered the Government service, and has just about become familiar with the duties of his office, he has started looking around for greener fields. We think that a better retirement system will deter so many employees from leaving. [102 Cong. Rec. 8657 (1956)]

Earlier, Senator Johnston had said:

Deficiencies and inequities in present law have been cited by management and employees as one of the reasons for the high separation rate of career personnel. The failure of the Government to keep pace with industry in retirement matters has been given as one of the reasons why it has become so difficult to attract scientists, engineers, doctors, nurses, and other classes of professional and skilled personnel needed to staff and efficiently and economically perform a multitude of Federal services. [102 Cong. Rec. 8548 (1956)]

¹⁴ While Congress appears to have constitutional power to reduce unvested retirement benefits by legislation, it would presumably not do so without giving full consideration to the equities of the immediately affected individuals and to the potentially demoralizing effect on federal employees generally.

some employees to choose early retirement, rather than to discourage them from doing so, as the court opined.¹⁵

When the flaws in the Court of Appeals' reasoning are considered it becomes apparent, at the least, that the court was entirely unjustified in rejecting the civil service agencies' established "subject to call" standard as an incorrect interpretation of the annuity computation of the Retirement Act. "To sustain the [agency's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Comm'n v. Aragon*, 329 U.S. 143, 153, quoted in, e.g., *Udall v. Tallman*, 380 U.S. 1, 16, *American Paper Institute v. American Electric Power Service Corp.*, — U.S. —, 103 S.Ct. 1921, 1932 (May 19, 1983).

¹⁵ Senator Johnston said:

The cost of the bill, if enacted, will prove to be a sound investment, from which Uncle Sam will receive handsome dividends in the years to come. It will also induce some employees to retire a little sooner than they would otherwise retire; and, at the same time, the bill would take up a certain amount of slack in unemployment at the present time. [102 Cong. Rec. 8550 (1956)]

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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STATUTORY APPENDIX

STATUTE INVOLVED5 U.S.C. §§ 8331 *et seq.***SUBCHAPTER III—CIVIL SERVICE RETIREMENT****§ 8331. Definitions**

For the purpose of this subchapter—

(1) “employee” means—

(A) an employee as defined by section 2105 of this title;

.

(3) “basic pay” includes—

(A) the amount a Member received from April 1, 1954, to February 28, 1955, as expense allowance under section 601(b) of the Legislative Reorganization Act of 1946 (60 Stat. 850), as amended; and that amount from January 3, 1953, to March 31, 1954, if deposit is made therefor as provided by section 8334 of this title;

(B) additional pay provided by—

(i) subsection (a) of section 60e-7 of title 2 and the provisions of law referred to by that subsection; and

(ii) sections 60e-8, 60e-9, 60e-10, 60e-11, 60e-12, 60e-13, and 60e-14 of title 2;

(C) premium pay under section 5545(c) (1) of this title; and

(D) with respect to a law enforcement officer, premium pay under section 5545(c) (2) of this title;

but does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation

except as provided by subparagraphs (B), (C), and (D) of this paragraph, retroactive pay under section 5344 of this title in the case of a retired or deceased employee, uniform allowances under section 5901 of this title, or lump-sum leave payments under subchapter VI of chapter 55 of this title. For an employee paid on a fee basis, the maximum amount of basic pay which may be used is \$10,000;

(4) "average pay" means the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service or, in the case of an annuity under subsection (d) or (e) (1) of section 8341 of this title based on service of less than 3 years, over the total service, with each rate weighted by the time it was in effect;

. . . .

§ 8332. Creditable service

(a) The total service of an employee or Member is the full years and twelfth parts thereof, excluding from the aggregate the fractional part of a month, if any.

(b) The service of an employee shall be credited from the date of original employment to the date of separation on which title to annuity is based in the civilian service of the Government. Credit may not be allowed for a period of separation from the service in excess of 3 calendar days. The service includes—

(1) employment as a substitute in the postal field service;

. . . .

§ 8334. Deductions, contributions, and deposits

(a) (1) The employing agency shall deduct and withhold 7 percent of the basic pay of an employee, 7½ per-

cent of the basic pay of a Congressional employee, a law enforcement officer, and a firefighter, and 8 percent of the basic pay of a Member. An equal amount shall be contributed from the appropriation or fund used to pay the employee or, in the case of an elected official, from an appropriation or fund available for payment of other salaries of the same office or establishment. When an employee in the legislative branch is paid by the Clerk of the House of Representatives, the Clerk may pay from the contingent fund of the House the contribution that otherwise would be contributed from the appropriation or fund used to pay the employee.

(2) The amounts so deducted and withheld, together with the amounts so contributed, shall be deposited in the Treasury of the United States to the credit of the Fund under such procedures as the Comptroller General of the United States may prescribe. Deposits made by an employee or Member also shall be credited to the Fund.

(b) Each employee or Member is deemed to consent and agree to these deductions from basic pay. Notwithstanding any law or regulation affecting the pay of an employee or Member, payment less these deductions is a full and complete discharge and acquittance of all claims and demands for regular services during the period covered by the payment, except the right to the benefits to which the employee or Member is entitled under this subchapter.

. . . .

§ 8339. Computation of annuity

(a) Except as otherwise provided by this section, the annuity of an employee retiring under this subchapter is—

- (1) $1\frac{1}{2}$ percent of his average pay multiplied by so much of his total service as does not exceed 5 years; plus

(2) $1\frac{3}{4}$ percent of his average pay multiplied by so much of his total service as exceeds 5 years but does not exceed 10 years; plus

(3) 2 percent of his average pay multiplied by so much of his total service as exceeds 10 years.

However, when it results in a larger annuity, 1 percent of his average pay plus \$25 is substituted for the percentage specified by paragraph (1), (2), or (3) of this subsection, or any combination thereof.

* * * *

(f) The annuity computed under subsections (a)-(e) and (o) of this section may not exceed 80 percent of—

(1) the average pay of the employee; * * *

* * * *

§ 8347. Administration; regulations

(a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.

* * * *

83-973

No.

Office - Supreme Court, U.S.

FILED

DEC 12 1983

ALEXANDER L. STEVAS.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICES, *et al.*,
Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2174

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Appellants

WILMA M. CARTER, *et al.*

v.

UNITED STATES POSTAL SERVICE, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 79-0874)

Argued October 1, 1982

Decided May 6, 1983

Darryl J. Anderson, with whom *Anton G. Hajjar* was on the brief, for appellants. *Thomas F. Bianco* also entered an appearance for appellants.

Rebecca L. Ross, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, and *Royce C. Lamberth* and *R. Craig Lawrence*, Assistant United States Attorneys, were on the brief, for appellees. *Kenneth M. Raisler*, Assistant United States Attorney, also entered an appearance for appellees.

Before TAMM and SCALIA, *Circuit Judges*, and OLIVER GASCH,* *U.S. Senior District Judge* for the District of Columbia.

Opinion for the court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge*: In late 1978 the American Postal Workers Union (APWU) learned that the Office of Personnel Management (OPM), at the behest of the United States Postal Service (USPS), had changed the method by which it calculates the civil service retirement benefits of certain postal workers retiring after February 11, 1978. This change substantially reduced the expected annuities of some 113,000 future retirees. APWU and several individual union members affected by the change filed suit against OPM¹ and USPS in the United States District Court for the District of Columbia, alleging that the defendants' actions violated the due process clause of the fifth amendment to the United States Constitution, the Postal Reorganization Act, the Civil Service Retirement Act, and the Administrative Procedure Act. Judge John Garrett Penn granted the defendants' motion for summary judgment, and plaintiffs appealed to this court. Because we agree that there were no disputed issues of material fact and that appellees were entitled to judgment as a matter of law, we affirm.

I. BACKGROUND

A. *Origin of the Method of Computation*

The past truly is prologue to this controversy. In 1920 Congress passed the first civil service retirement

* Sitting by designation pursuant to 28 U.S.C. § 294(c) (1976).

¹ Plaintiffs also sued the then-director of OPM, Alan K. Campbell, both individually and in his official capacity. Pursuant to Fed. R. App. P. 43(c) (1), the present director of OPM, Donald J. Devine, is substituted for Alan K. Campbell in his official capacity.

act, which provided that any eligible employee in the classified civil service could receive an annuity based upon his or her years of federal service and average annual salary. Act of May 22, 1920, ch. 195, 41 Stat. 614. To help finance the retirement system, the Act authorized the withholding of a percentage of each covered employee's "basic salary, pay, or compensation" and contribution of the amount withheld to the civil service retirement and disability fund. *Id.* § 8, 41 Stat. at 618. The Commissioner of Pensions, under the direction of the Secretary of the Interior, was charged with administration of the statute. *Id.* § 4, 41 Stat. at 616.

When the federal retirement system was instituted, postal workers were employed by a department of the United States Government, the United States Post Office Department, Act of June 8, 1872, ch. 335, §§ 1-2, 17 Stat. 283, 283-84, and were members of the classified civil service, Act of Jan. 16, 1883, ch. 27, § 6, 22 Stat. 403, 406. Like other federal civil servants, they were eligible for retirement benefits. Indeed, postal employees were instrumental in securing passage of the 1920 act. 59 Cong. Rec. 6287 (1920) (remarks of Rep. Nelson). Computation of a regular full-time postal worker's annuity posed no problem; like that of any other federal worker, a postal worker's annuity depended on two components: the worker's years of federal service and the average of the employee's annual pay over a statutorily prescribed number of years.² Not all postal workers, however, were regular full-time employees. Because processing and delivering mail had to be done on a daily basis, a full complement of postal workers was re-

² Since 1920 Congress has prescribed various methods of computing retirement benefits, but all the methods have used the same two determining factors: years of service and average annual salary. See 5 U.S.C. § 8339 (1976 & Supp. V 1981); Act of May 29, 1930, ch. 349, § 4, 46 Stat. 468, 471-72; Act of July 3, 1926, ch. 801, § 4, 44 Stat. 904, 907; Act of May 22, 1920, ch. 195, § 2, 41 Stat. 614, 614-15.

quired at all times, and the Post Office employed "substitutes" to do the work of absent employees. *See generally* Act of Mar. 3, 1905, ch. 1480, 33 Stat. 1082, 1085-86; Act of June 27, 1884, ch. 126, 23 Stat. 60; Act of Aug. 2, 1882, ch. 373, § 2, 22 Stat. 185, 185-86.

Postal substitutes were unique in that the time they actually worked was far less than the time during which they had to be available for work. Obviously, the Post Office could not efficiently hire a new worker each time a regular employee was absent on short notice. Thus, the Post Office maintained a pool of acceptable substitute employees, who actually worked only when needed to replace absent regular employees. Congress demonstrated its awareness of this unique feature of postal substitute employment by providing in the 1920 retirement act that in giving a substitute credit for service, the Secretary of the Interior could include only the amount of time actually worked. Act of May 22, 1920, ch. 195, § 3, 41 Stat. 614, 616.

In 1926 a joint committee of Congress heard testimony about the predicament of postal substitutes. They were paid a small hourly wage only when they actually worked, which was infrequent and unpredictable. A substitute's income, therefore, was generally not enough to provide a decent living, yet substitutes were unable to secure any additional employment because they had to be available for postal work at all times. It was suggested that substitutes be recompensed for these onerous employment conditions. *The Civil Service Retirement Act: Joint Hearings Before the Senate and House Committees on Civil Service*, 69th Cong., 1st Sess. 63, 66, 68 (1926) (testimony of M.T. Finnan, Secretary, National Association of Letter Carriers). The bill reported by the committee and passed by Congress amended the retirement law to require that a substitute's credited service include the entire period of employment as a substitute, regardless of the actual time worked. Act of July 3,

1926, ch. 801, § 5, 44 Stat. 904, 907. Thus, by 1926 it was established that for the purpose of annuity computation, postal substitutes would receive service credit for time during which they had not actually worked.

In 1928 a decision of the Comptroller General laid the foundation for substitutes to receive salary credit for pay that they had not actually earned. In that case a federal employee who held two positions, one with the Veteran's Administration and one as a postal substitute, was alleged to have violated a statute establishing a maximum annual federal salary. See Act of Aug. 29, 1916, ch. 417, 39 Stat. 556, 582. The Comptroller General ruled that for the purpose of determining whether a postal substitute had earned more than the statutory maximum annual salary, the substitute's salary "per annum" was not the pay actually earned but rather the worker's annual salary rate, calculated by multiplying the substitute's hourly wage by the number of possible work hours in a year. *Compensation—Double*, 8 Comp. Gen. 261, 263 (1928). On the basis of this ruling, the Secretary of the Interior likewise began computing substitutes' annuities on the basis of the employee's average annual salary rate rather than the pay actually earned. See Brief for Appellees at 5. Because the retirement system was partially financed by money withheld from employees' actual pay, the effect of using this hypothetical full-time salary in the computation formula was that substitutes' benefits were disproportionate to the substitutes' contributions to the retirement fund.

In the 1956 civil service retirement act, Congress reaffirmed its approval of giving substitutes service credit for the entire period of their employment, regardless of the time actually worked. Civil Service Retirement Act Amendments of 1956, ch. 804, sec. 401, § 3(a), 70 Stat. 736, 743, 745 (codified as amended at 5 U.S.C. § 8332 (b)(1) (1976 & Supp. V 1981)). However, Congress never explicitly approved the practice of giving substi-

tutes salary credit on the basis of a hypothetical full-time salary. Thus, substitutes' receipt of annuities based on a hypothetical full-time salary derived solely from administrative practice.

In 1970 Congress passed the Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719 (1970) (codified at 39 U.S.C. §§ 101-5605 (1976 & Supp. V 1981)), which created USPS as an independent executive agency, *id.* sec. 2, § 201. Although the PRA removed postal employees from the competitive civil service, *id.* § 1001, it expressly provided that postal workers would continue to be covered by the civil service retirement system, *id.* § 1005(d).

The Civil Service Commission and OPM³ continued to compute substitutes' annuities using the hypothetical full-time salary until 1978. In January of that year, with no notice to the APWU or to individual postal workers, OPM decided that, effective February 11, 1978, only actual pay would be included in the computation of the substitutes' average annual salary. The change in the annuity computation formula was made after USPS, in a series of communications to OPM in 1977, expressed its view that substitutes were no longer entitled to receive annuities computed using the hypothetical full-time salary. See Brief for Appellants at 12-14 (summarizing USPS's contacts with OPM). Appellants allege that USPS was motivated to seek the change in the annuity computation method by the threat of having to pay some \$150 million in unfunded liabilities of the civil service retirement

³ In 1934 the Civil Service Commission (CSC) replaced the Commissioner of Pensions as administrator of the civil service retirement law. Exec. Order No. 6670 (1934). In 1978 OPM succeeded to all the rights and duties of the CSC in administering the retirement law. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 906(a) (2), (3), 92 Stat. 1111, 1224-25. We will use "OPM" and "CSC" interchangeably.

fund.⁴ See Brief for Appellants at 12. It is appellees' actions in changing the calculation of the annuity formula's second component—the average annual salary—that appellants now challenge.

B. Justification for the Change in the Method of Computation

Although it is clear that the hypothetical full-time salary was originally adopted for use in the annuity computation formula as a result of the Comptroller General's ruling under the double compensation statute, it is not clear how its use was originally rationalized. The parties agree, however, that OPM subsequently justified its use on the ground that substitutes were "subject to call." They also agree that OPM justified the change in the formula on the ground that substitutes are no longer

⁴ The only postal substitutes who had ever been covered by the civil service retirement law were "career" substitutes. "Temporary" substitutes had never been in the civil service retirement system. See 59 Cong. Rec. 2845-47 (1920) (remarks of Senators Sterling and King); see also *Post Office Appropriation Bill, 1921: Hearings Before the House Comm. on the Post Office and Post Roads*, 66th Cong., 2d Sess. 59 (1920) (testimony of John C. Koons, Assistant Postmaster General). Pursuant to the first collective bargaining agreement between USPS and APWU after passage of the Postal Reorganization Act, 39 U.S.C. §§ 101-5605 (1976 & Supp. V 1981), in 1971 USPS agreed to convert all temporary substitutes into a job classification covered by civil service retirement. See note 5 *infra*. These newly covered employees would receive service credit for years of work during which they did not contribute to the civil service retirement fund, and therefore, the civil service retirement fund would suffer an "unfunded liability" on their account. In 1974 Congress provided that USPS would henceforth be liable for any unfunded liabilities resulting from labor-management agreements increasing postal workers' pay. 5 U.S.C. § 8348(h)(1) (Supp. V 1981). Pursuant to 5 U.S.C. § 8348(h)(2), OPM furnished USPS with the \$150 million estimate of its liability. We intimate no view on the correctness of OPM's determination of USPS's liability.

"subject to call." This term does not appear in any statute or published regulation, and it has never been defined. The parties agree that it describes working conditions, but because they disagree on precisely what conditions it comprehends, they disagree on whether substitutes are still "subject to call." This disagreement over the nature of the current working conditions of substitutes and whether those conditions render substitutes "subject to call" is the only apparent dispute between the parties.

Over the past eighty years the conditions of postal substitute employment have changed. In the 1890's, it seems, substitutes were required to physically report for duty at the post office ("shape up") two or three times each day. *George M. Gerhauser*, 21 *Decisions Relating to Pensions and Annuities* 80, 81 (Sec'y of the Interior 1921) (quoting letter of Nov. 26, 1920, from postmaster at Washington, D.C., to Comm'r of Pensions). By 1918 substitutes were required to "shape up" in the morning and wait for work all day and into the evening. *Civil Service Retirement Act: Hearings on H.R. 11352 Before the House Comm. on Interstate and Foreign Commerce*, 65th Cong., 2d Sess. 68 (1918) (reprinting statement of Thomas F. Flaherty, Secretary-Treasurer, National Federation of Post-Office Clerks). By the 1940's, at least, substitutes were required merely to be available by telephone if needed to work on short notice. Deposition of Deputy Postmaster General James V.P. Conway 33-36, Joint Appendix (J.A.) at 31-34. By the mid-1970's, after passage of the Postal Reorganization Act, substitutes—now called "part-time flexible" employees⁵—still had to be available to work on short notice. Agreement Between USPS and APWU § 8, at 9 (July 21, 1975 to July 20, 1978) (employees may be "requested or sched-

⁵ Neither this change in terminology nor the 1973 reclassification of former "temporary substitutes" as "part-time flexibles," see note 4 *supra*, affects our analysis of the issues in this case. We will refer to all former substitutes as "PTF's."

uled" to work), J.A. at 137. The 1975 collective bargaining agreement between USPS and APWU gave PTF's a "guaranteed tour of duty"; that is, they would be guaranteed a minimum of either two or four hours' pay each time they were called in to work. *Id.*, J.A. at 137.

The parties' disagreement over the meaning of "subject to call" stems not only from appellees' failure ever to define "subject to call" but also from appellees' failure to set out clearly why they believe PTF's are no longer "subject to call." Initially, OPM justified the change by noting that PTF's "are not 'subject to call' on a full time basis as postal substitutes had been in the past. Instead, they work under a 'guaranteed tour of duty' of 2 or 4 hours per pay period" CSC Bureau of Retirement, Insurance, and Occupational Health (BRIOH), Letter No. 10-12 (Oct. 16, 1978), J.A. at 103. This statement suggests that PTF's ceased being "subject to call" when they acquired the guaranteed tour of duty, but appellees also seem to claim that substitutes ceased being "subject to call" when they were no longer required to "shape up." Brief for Appellees at 3, 5-6, 9, 15, 18-19. Appellees have also attempted to justify the change on the ground that PTF's need no longer even be available on short notice because they are "told in advance of both the days and the times they [are] expected to work." Brief for Appellees at 6.

Appellants sharply disagree with appellees' various reasons for believing that PTF's are not "subject to call." They contend that the "guaranteed tour of duty" simply assures that when PTF's are called in to work, they will receive a guaranteed minimum number of paid hours of work. Brief for Appellants at 24-26; *see* Affidavit of James V.P. Conway, Deputy Postmaster General, ¶ 5, Appellees' Appendix (A.A.) at 6. Since the guaranteed tour does not affect the availability requirement, they assert, the guaranteed tour could not itself constitute elimination of the "subject to call" requirement. Appellants

seem to agree with appellees that "shaping up" is comprehended by the term "subject to call," but they vehemently disagree that once PTF's were no longer required to "shape up" they ceased being "subject to call." According to appellants, "subject to call" also comprehends the requirement that PTF's be available to work on short notice, a requirement which they allege is still enforced, contrary to appellees' assertions. Brief for Appellants at 22-24.

II. ANALYSIS

A. *Standard of Review*

The standard for our review of the district court's grant of summary judgment is clear:

In reviewing the propriety of a summary judgment, it is our responsibility to determine whether there was any issue of fact pertinent to the ruling and, if not, whether the substantive law was correctly applied. . . . Thus, to be upheld, the summary judgment under review must withstand scrutiny on both its factual and legal foundations.

Bloomgarden v. Coyer, 479 F.2d 201, 206-07 (D.C. Cir. 1973). Since the materiality of any disputed factual issues can be determined only in reference to specific legal contentions, we turn now to a discussion of appellants' legal challenges to the new method of annuity computation.

B. *Appellants' Legal Arguments*

1. The Due Process Claim

The facts pertinent to this claim are not disputed. OPM's decision to change the method of computation effective for PTF's retiring after February 11, 1978, was made in January 1978. Notice of the change was given to USPS the same month, but APWU and individual postal workers received constructive notice of the change only in April 1978, when the change was noted in the USPS Employee and Labor Relations Manual. Deposi-

tion of James V.P. Conway, Deputy Postmaster General, at 42, J.A. at 37. Appellants argue that appellees' actions in changing the method of annuity computation with no prior notice to the affected PTF's violated their right to due process of law secured by the fifth amendment to the United States Constitution.

Appellants' due process rights are implicated only if appellants had an interest protected by the due process clause.⁶ Appellants argue that their interest in annuities computed using the hypothetical full-time salary is a protected property interest. The district court rejected this claim on the ground that a protected property interest in civil service retirement benefits does not exist until retirees are "entitled to 'immediate payment under the preexisting law.'" Memorandum, *American Postal Workers Union v. United States Postal Service*, CA 79-0874, at 6 (D.D.C. Sept. 2, 1981) (quoting *Nordstrom v. United States*, 342 F.2d 55, 60 (Ct. Cl. 1965)). Because none of appellants had applied for retirement benefits by the effective date of the change, the district court reasoned, no appellant on that date had a right to begin receiving an annuity, and thus no appellant had a protected property interest in benefits calculated using the pre-1978 method.

We agree with the district court's conclusion. Appellants, relying on *Board of Regents v. Roth*, 408 U.S. 564 (1972), allege that on February 11, 1978, PTF's had a "legitimate claim of entitlement," *id.* at 577, to annuities calculated using a hypothetical full-time salary. There

⁶ We note that appellants do not claim to have been deprived of benefits derived from their own and USPS's contributions to the civil service retirement fund, which are based on appellants' actual pay. Rather, they claim to have been deprived of the funds that would have been used to supply the difference between the benefits they would have received under the pre-1978 method of calculation and the lower benefits they will receive under the current method.

is no doubt that appellants had an *expectation* of receiving annuities based on the hypothetical full-time salary, an expectation that was perfectly reasonable in light of OPM's fifty-year-old practice of using that method of computation. However, a reasonable expectation does not constitute a property interest.

To have had a property interest in a particular level of benefits, appellants must have been legitimately entitled to benefits at that level. Their entitlement to retirement benefits is determined by the provisions of the Civil Service Retirement Act, 5 U.S.C. §§ 8331-8348 (1976 & Supp. V 1981), the "independent source" that creates and defines property interests in civil service retirement benefits. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Act provides that annuities are available only to employees who have met specific age, service, or disability requirements and who have separated from the service. 5 U.S.C. §§ 8336-8338 (1976 & Supp. V 1981). A retiree who meets these eligibility requirements acquires an interest protected by the due process clause in benefits at the level provided by the law in effect at the time he or she becomes eligible.

Potential retirees have no protected property interest in any particular level of retirement benefits. A protected interest in retirement benefits arises only at the point when the federal employee actually retires, that is, separates from the service. Federal workers may participate in the retirement system for many years, and over the years the benefits available through that system may be changed in accordance with law. It is therefore necessary that a given employee's interest in an annuity be measured at a particular temporal point. Until the employee becomes eligible for benefits as prescribed by the Act, his or her rights are subject to any lawful changes made to the Act from which the claim to entitlement arises. Here, although some of appellants met the age and service requirements for retirement before Feb-

ruary 11, 1978, none had separated from the service. Since the change in the method of annuity computation was made lawfully, as we shall see, and since no appellant had a "legitimate claim of entitlement" to an annuity prior to February 11, 1978, the change in the method of computation did not violate appellants' rights under the due process clause.

2. The Postal Reorganization Act Claim

The facts material to this challenge are also undisputed. The Postal Reorganization Act (PRA), 39 U.S.C. §§ 101-5605 (1976 & Supp. V 1981), established collective bargaining between USPS and postal employees. *Id.* §§ 1201-1209. Pursuant to the PRA, employee-management relations are governed by provisions of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.* (1976), "to the extent not inconsistent with provisions of" the PRA. 39 U.S.C. § 1209 (1976). Two provisions of the PRA relevant to this controversy are subsections (d) and (f) of 39 U.S.C. § 1005 (1976). Subsection (d) of section 1005 provides that postal employees shall be covered by the civil service retirement system. Subsection (f) provides: (1) that postal employees will retain the "[c]ompensation, benefits, and other terms and conditions of employment in effect immediately prior to the effective date" of the PRA until they are lawfully changed by USPS; (2) that "[n]o variation, addition, or substitution with respect to fringe benefits shall result in a program of fringe benefits which on the whole is less favorable to the officers and employees than fringe benefits in effect on the effective date" of the PRA; and (3) that "no such variation, addition, or substitution [in fringe benefits] shall be made except by agreement between the collective-bargaining representative and the Postal Service."

Appellants argue that USPS violated subsection (f) of section 1005 by procuring the change in the annuity

computation method. They reason that annuities calculated using the hypothetical full-time salary were part of the "compensation, benefits, and other terms and conditions of employment" existing on the effective date of the PRA to which PTF's were entitled unless those benefits were lawfully changed by USPS. The reduction in retirement benefits, appellants contend, could only have been effected through collective bargaining and then only if other benefits were gained so that the package of benefits as a whole remained as favorable to employees as the benefits existing on the effective date of the PRA. Appellants conclude that because USPS did not bargain with the postal employees' unions over the change and because the resulting reduction in PTF annuities was not offset by any gain in benefits, the change infringed section 1005(f). In addition, appellants contend that OPM violated subsection (f)'s requirement that no change in employment benefits can be less favorable to employees than those existing on the effective date of the PRA.

The district court rejected appellants' PRA challenge, reasoning that the commands of subsection (f) are limited by the provision of subsection (d) that postal workers are covered by the civil service retirement law. Subsection (d)'s specific reference to civil service retirement, in the district court's view, controls subsection (f)'s general reference to "compensation, benefits, and other terms and conditions of employment"; thus, retirement benefits are not encompassed by subsection (f) and are not subject to collective bargaining. Moreover, the district court noted, the PRA's legislative history reveals both Congress's awareness that changes might be made in the civil service retirement law and its intention that postal workers be subject to those changes; Congress contemplated only that postal workers be able to bargain for retirement benefits in addition to those provided by the civil service retirement law. Memorandum, *American Postal Workers Union v. United States Postal Service*, CA 79-0874, at 10 (D.D.C. Sept. 2, 1981), J.A. at 13.

Our review of the PRA and its legislative history convinces us that the district court's conclusion is correct. We begin from the following proposition: because the NLRA requires private employers to bargain with employees about retirement benefits, *Inland Steel Co. v. NLRB*, 170 F.2d 247, 251-55 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), USPS, by virtue of 5 U.S.C. §§ 1201-1209, must bargain with postal workers about retirement benefits unless relieved of that duty by another provision of the PRA. *Id.* § 1209. We note that the PRA provides retirement benefits to postal workers under a subsection completely separate from the one providing that changes in "compensation, benefits, and other terms and conditions of employment" must be collectively bargained. Purely as a matter of statutory construction, the specific provision in section 1005(d) for civil service retirement coverage controls the general reference to "compensation, benefits, and other terms and conditions of employment" in section 1005(f). *See generally* 2A C. Sands, *Statutes and Statutory Construction* § 46.05, at 57 (4th ed. 1973).

This canon of statutory construction is buttressed here by the unreasonable result rendered by a contrary construction. Subsection (f) provides that postal workers' "benefits" cannot be changed without collective bargaining. The only governmental entity having a duty to bargain collectively under the PRA is USPS, yet USPS has absolutely no control over the substance or administration of the civil service retirement act, to which postal workers are subject under subsection (d). Thus, if we were to adopt appellants' view of the PRA, we would require USPS to bargain with postal workers about a benefit that USPS can neither grant nor deny, increase nor decrease. Clearly Congress could not have intended such an anomalous result.

Congress's intent in subsections (d) and (f) is, in fact, made clear in the legislative history of the PRA.

Members of Congress were concerned about the status of postal employees under the proposed independent USPS. 116 Cong. Rec. 19,853-54 (1970) (remarks of Rep. Scott); *id.* at 20,227 (remarks of Rep. Olsen); *id.* at 20,228-29 (remarks of Rep. Sisk). H.R. 17070, the bill that was enacted as the PRA, provided for creation of a "postal career service, which shall be a part of the civil service." H.R. 17070, § 201, 91st Cong., 2d Sess. (1970) (codified at 39 U.S.C. § 1001 (1976)). The effect of this provision, explained Congressman Derwinski, one of the co-sponsors of H.R. 17070, would be to remove postal service employees from the competitive civil service and thereby permit them to bargain over standards governing appointment, promotion, compensation, and adverse action. 116 Cong. Rec. 20,231 (1970). In the view of H.R. 17070's supporters, the postal employees' loss of the protection of the civil service merit system was justified by their anticipated greater opportunity for career development and advancement and their new right to bargain collectively for benefits. *Id.* at 20,203 (remarks of Rep. Brasco); *id.* at 20,206 (remarks of Rep. Fulton); *id.* at 20,208 (remarks of Rep. Tiernan); *id.* at 20,229 (remarks of Rep. Udall); *see* 39 U.S.C. § 1001 (1976).

However, USPS employees would not forfeit all the benefits of membership in the civil service. As Congressman Udall, one of the co-sponsors of H.R. 17070, explained, with the creation of USPS the PRA in effect "created a new kind of Federal employee." 116 Cong. Rec. 20,229 (1970). Postal workers would henceforth be hybrid employees, with some of the rights and benefits of federal employees and some of the rights and benefits of private employees, most importantly, the right to bargain collectively. *Id.* (remarks of Rep. Udall). Congressman Udall pointed out that postal employees' "federal" benefits would continue to be controlled by Congress, while those benefits over which Congress relinquished control would be set through collective bar-

gaining. The three federal benefits over which Congress retained control are retirement, veteran's preference, and workers' compensation. The rights and benefits to be set by collective bargaining include hiring and promotion, health and life insurance, pay, and disciplinary action. *Id.* at 20,230 (remarks of Rep. Udall); *see* 39 U.S.C. § 1005(a)(1)(A), (a)(2), (c), (d) (1976)).

Congressman Derwinski noted on the floor of the House that one of the exceptions to the postal workers' right to bargain collectively is their coverage by the civil service retirement law. *Id.* at 27,602. In addition, when asked what effect the proposed bill would have on postal employees,⁷ the Comptroller General replied, "With the exception of . . . retirement benefits, which would continue to be provided under the civil service retirement program . . ., all compensation, benefits and other terms and conditions of employment would be determined . . . through collective bargaining" Letter from Comptroller General Keller to Hon. William L. Scott (Mar. 31, 1970), *reprinted in* H.R. Rep. No. 1104, 91st Cong., 2d Sess. 67-69 (1970) (supplemental views of Congressman William L. Scott); *accord* *Postal Reform: Hearings on H.R. 17070 and Similar Bills Before the House Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 93 (1970) (testimony of Francis S. Filbey, President, United Federation of Postal Clerks); *id.* at 97 (remarks of Rep. Brasco). Permeating the PRA's legislative history is Congress's understanding that USPS employees' benefits would be partially provided by each of two separate and mutually exclusive systems: collective bargaining and the civil service system. Thus, we conclude that

⁷ The Comptroller General's comment was directed to H.R. 4, a postal reorganization bill very similar to H.R. 17070 that was introduced earlier in the same Congress. The material employment provisions of H.R. 17070 were identical to the provisions of H.R. 4 discussed by the Comptroller General. *Compare* H.R. 4, 91st Cong., 1st Sess. §§ 803(c), 804, *with* H.R. 17070, 91st Cong., 2d Sess. §§ 203(c), 204.

USPS had no duty to bargain over the change in the annuity computation method because Congress did not intend to include civil service retirement benefits within the subsection (f) benefits that can be changed only through collective bargaining.

Appellants also argue that, apart from any collective bargaining requirement, OPM could not lawfully change the method of computing PTF annuities. Appellants assert that the retirement benefits in effect when the PRA was passed, which were computed using the hypothetical full-time salary, were part of the benefit "floor" provided by subsection (f), which no government agency can reduce. Reply Brief for Appellants at 2 n.2. It is clear to us, however, that the benefit floor provided by subsection (f) was intended merely to continue in effect the pay and benefits enjoyed by postal employees under the Post Office Department until pay and benefits could be set through collective bargaining with the newly created USPS. H.R. Rep. No. 1104, 91st Cong., 2d Sess. 10, 21-22 (1970). Logically, therefore, the benefit floor includes only those benefits within the scope of collective bargaining. See 116 Cong. Rec. 20,231 (1970) (remarks of Rep. Derwinski); *Postal Reform: Hearings on H.R. 17070 and Similar Bills Before the House Comm. on Post Office and Civil Service*, 91st Cong., 2d Sess. 20 (1970) (testimony of Postmaster General Blount). Since retirement benefits are not subject to collective bargaining, they are not part of the benefit floor provided by subsection (f). Thus, the PRA provides no guaranteed minimum level of PTF annuities, and OPM did not violate subsection (f) by changing the computation formula.

Our conclusion that Congress provided neither collective bargaining over civil service retirement benefits nor a guaranteed minimum level of retirement benefits is reinforced by the House committee report on H.R. 17070. The committee noted that postal employees would be "covered by the Civil Service retirement program, as

that program may from time to time be changed by law," H.R. Rep. No. 1104, 91st Cong., 2d Sess. 28 (1970), indicating that under the PRA postal workers' retirement benefits would be subject to the vicissitudes of the law governing the civil service retirement system. In addition, the committee's statement that postal workers can bargain for *supplemental* retirement benefits, *id.*, underscores the bill's exclusion of civil service retirement benefits from the collective bargaining required by subsection (f). We therefore agree with the district court that appellees did not transgress the PRA in changing the method of annuity computation.

3. The Civil Service Retirement Act Claim

Appellants have not vigorously asserted this claim, *see* Brief for Appellants at 1, 41; therefore, we address it only briefly. The undisputed facts are as follows: The change in the annuity computation method was originally announced in an unpublished CSC minute (Minute 7) on January 12, 1978. J.A. at 208. By its terms, Minute 7 applied only to PTF's working in third-class post offices—approximately 13,000 of the 113,000 PTF's employed by USPS. However, on October 16, 1978, the Bureau of Retirement, Insurance, and Occupational Health (BRIOH) expanded use of the new method of computation to cover the additional 100,000 PTF's employed in first- and second-class post offices. BRIOH, Letter No. 10-12, at 1 (Oct. 16, 1978), J.A. at 103. In doing so, appellants contend, BRIOH violated the Civil Service Retirement Act, 5 U.S.C. §§ 8331-8348 (1976 & Supp. V 1981), by usurping the authority of the CSC to administer the Act.

There is no doubt that when the change in the annuity computation method was made, CSC alone had the right to administer the Act. 5 U.S.C. § 8347(a) (1976). Through its own regulations, however, CSC delegated some administrative authority to BRIOH, reserving to

itself the authority to approve "basic policies affecting the administration of the retirement . . . laws." A.A. at 22. In Minute 7 CSC established a policy of using actual pay as the basis for calculating the annuities of PTF's who were no longer "subject to call." It is clear from the record that USPS represented to CSC that *all* PTF's, not just those in third-class post offices, were no longer "subject to call" and thus no longer entitled to annuities based on a hypothetical full-time salary. See Memorandum from D.M. Mikules to Craig Pettibone (CSC May 24, 1978), J.A. at 143; Letter from James V.P. Conway, Deputy Postmaster General, to Thomas A. Tinsley, Director, BRIOH, at 2 (Aug. 4, 1977), J.A. at 203. Therefore, BRIOH reasonably could have applied this policy in calculating the annuities of PTF's in first- and second-class post offices, who, according to USPS, were also no longer "subject to call." In any case, this expanded application of the annuity computation policy established in Minute 7 has been ratified by OPM in its brief before this court. We therefore hold that BRIOH's action in applying the annuity computation formula to all PTF's in October 1978 did not violate the Civil Service Retirement Act.

4. The Administrative Procedure Act Claim

Finally, appellants contend that OPM's admitted failure to follow notice and comment procedures in changing the method of annuity computation violated the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1976). Appellees respond by arguing that the change is exempt from the informal rulemaking provisions of the APA because it is an interpretative rule exempted by section 553(b)(A).⁸ It is in connection with this claim that the

⁸ Appellees also contend that the change is not a rule at all. The APA defines a "rule" very broadly, in relevant part as "the whole or a part of an agency statement of general or particular applicability and future effect designed to imple-

materiality of the dispute over the working conditions of PTF's becomes an issue.

a. *Characterization of the Rule*

Appellees assert that at most the rule is interpretative, while appellants argue that the rule is legislative because it conclusively affects the substantive rights of a large number of postal employees. The district court held that the new method of annuity computation was an interpretative rule and was therefore exempt from section 553 rulemaking requirements. Memorandum, *American Postal Workers Union v. United States Postal Service*, CA 79-0874, at 6, 10 (D.D.C. Sept. 2, 1981), J.A. at 9, 13. We agree with the district court's conclusion.

The first step in deciding the nature of a rule is to ascertain whether the rule can possibly be legislative. A rule can be legislative only if Congress has delegated legislative power to the agency and if the agency intended to use that power in promulgating the rule at issue. *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1153 & n.24 (D.C. Cir. 1977). Because appellants have not identified a particular statutory provision as the source of OPM's alleged power to promulgate legislative rules, we assume that appellants believe the new rule to have been promulgated pursuant to 5 U.S.C. § 8347(a). That section grants to OPM the gen-

ment, interpret, or prescribe law or policy." 5 U.S.C. § 551(4) (1976). We believe that the change in the annuity computation formula, as announced in Minute 7 and BRIOH Letter No. 10-12, is a statement having future effect that both prescribes and implements OPM's policy of no longer using a hypothetical full-time salary in calculating PTF annuities. The new PTF annuity computation formula is therefore a "rule." In light of our holding that the rule is interpretative and thus exempt from § 553 rulemaking requirements, *see* pp. 22-25 *infra*, we need not address appellees' further contention that the rule is exempt because it relates to personnel or benefits under 5 U.S.C. § 553(a) (2).

eral power to "administer" the Civil Service Retirement Act and to "prescribe such regulations as are necessary and proper to carry out" the Act. 5 U.S.C. § 8347(a) (Supp. V 1981).

We find it unnecessary, however, to decide whether OPM could promulgate legislative rules under section 8347(a), for it is clear that in this case OPM did not intend to exercise any delegated legislative power. See 2 K. Davis, *Administrative Law Treatise* § 7:9, at 42 (2d ed. 1979); *id.* § 7:11, at 54. OPM has denied that it intended to promulgate a legislative rule. Brief for Appellees at 26-28. While an agency's characterization of its own action is not conclusive, *Citizens to Save Spencer County v. United States Environmental Protection Agency*, 600 F.2d 844, 879 n.171 (D.C. Cir. 1979); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972), an objective examination of the context of the rule indicates that OPM's characterization accurately reflects its intent.

First, the origin of the pre-1978 method of computation indicates that it was not intended to be a legislative rule. Although the 1926 retirement act contained a provision in pertinent part very similar to present section 8347, Act of July 3, 1926, ch. 801, § 17, 44 Stat. 904, 913; see 5 U.S.C. § 8347 (1976) (historical and revision note on substitution of language), the Secretary of the Interior apparently did not rely on his power to make rules and regulations when instituting use of the hypothetical full-time salary. Instead, he appears merely to have interpreted the term "average annual basic salary" in the retirement law in conformity with the Comptroller General's interpretation of the term "salary per annum" in the double compensation statute. See p. 5 *supra*. Thus, the annuity computation formula originated as an interpretation of the retirement act.

Second, the new rule does not "fill in the gaps" in a complicated regulatory scheme. Cf. *Citizens to Save*

Spencer County v. United States Environmental Protection Agency, 600 F.2d 844, 879 (D.C. Cir. 1979) (agency rules filling breach in directives of Clean Air Act were legislative). Instead, the rule deals with an aspect of the Civil Service Retirement Act already prescribed in detail by Congress—the method of computing retirees' annuities. Congress has prescribed a basic formula for computing a retiree's benefits, 5 U.S.C. § 8339(a)(1)-(3) (1976), and has prescribed other formulas for various specific classes of employees, including Members of Congress, congressional employees, and employees of the Panama Canal Company, *id.* § 8339(b), (c), (d)(2) (1976 & Supp. V 1981). Congress has defined both the computation factors to be used: "total service," *id.* §§ 8332(a), 8331(12) (1976), and "average pay," which is derived from "basic pay," *id.* § 8331(3)-(4). Although Congress did not prescribe a special computation formula for PTF's, it did define "total service" for PTF's to include periods during which they did not actually work. *Id.* § 8332(b)(1) (1976 & Supp. V 1981).

Within this detailed statutory framework, OPM has calculated the "average pay" for workers who are "subject to call" to include pay the employees did not actually earn. This practice is nothing more than an interpretation of the statutory term "average pay," *see* Brief for Appellees at 31; that is, in OPM's view, Congress intended that employees working under certain conditions receive the benefit of annuities computed using an enhanced "average pay" figure. In changing the PTF annuity computation formula, OPM merely interpreted the term "average pay" as applied to PTF's to include only pay actually earned. Thus, the new rule meets the classic definition of an interpretative rule: it is a "statement[] as to what the administrative officer thinks the statute or regulation means." *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

Appellants argue that the new rule conclusively affects the retirement rights of thousands of PTF's and is there-

fore a legislative rule. The cases cited by appellants do not support their contention. In *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir. 1980), this court reviewed a change in the Department of Labor's method of measuring unemployment for the purpose of allocating CETA funds to the states. We noted that the change would have a substantial impact on a state's right to receive CETA funds. However, our decision that the new method was a legislative rule rested on the fact that the Department of Labor had exercised the power delegated to it by the CETA statute "to prescribe rules with the force of law concerning the development of unemployment statistics." *Id.* at 705 (footnote omitted). Similarly, in *Joseph v. United States Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977), our decision that a CSC rule exempting certain political activities from coverage under the Hatch Act was a legislative rule was based not on the rule's impact but rather on the fact that it was promulgated pursuant to a specific delegation of legislative power in the governing statute. *Id.* at 1153. The Fifth Circuit's decision in *Brown Express, Inc. v. United States*, 607 F.2d 695 (5th Cir. 1979), is also inapposite. There, the Fifth Circuit examined an ICC rule's impact on the motor carrier industry solely in order to decide whether it was a "rule of agency procedure" exempted from notice and comment requirements by 5 U.S.C. § 553(b) (A). *Id.* at 701-03. Despite its finding of substantial impact, the Fifth Circuit expressly refused to find that the rule was legislative. *Id.* at 700 n.5.

As Professor Davis has noted, the impact of a rule has no bearing on whether it is legislative or interpretative; interpretative rules may have a substantial impact on the rights of individuals. 2 K. Davis, *Administrative Law Treatise* § 7:8, at 39 (2d ed. 1979). Thus, the substantial impact of the new rule on the retirement rights of 113,000 future retirees does not transform it into a legislative rule. As an interpretative rule, the new annuity computation formula is exempt from the rulemak-

ing requirements of the APA, and OPM therefore did not act unlawfully in promulgating it without notice and comment proceedings.

b. *Review of the Rule*

Having characterized the rule as interpretative, we must now review it. In doing so we are not bound by the agency's determination since an interpretative rule, unlike a legislative rule, does not have the force of law. *Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1154 n.26 (D.C. Cir. 1977). Instead, we review the interpretative rule to determine its consistency with the governing statute and regulations. Although we may defer to the agency interpretation, we are free to substitute our own judgment for that of the agency in determining the propriety of the rule. *Id.*; see 2 K. Davis, *Administrative Law Treatise* § 7:13, at 59 (2d ed. 1979).

We are convinced that the new method of annuity computation is a proper interpretation of the Civil Service Retirement Act. Before explaining this conclusion, we emphasize the precise parameters of our review. The parties have framed their discussion largely in terms of whether OPM lawfully determined that PTF's are no longer "subject to call," and the single disputed factual issue in this case is whether PTF's are in fact no longer "subject to call." In essence, appellants' argument is as follows: The new annuity computation formula represents a change in OPM's policy, which it justified on the basis that the working conditions of PTF's have changed and they are no longer "subject to call." Whatever the change in the working conditions of PTF's between the late 1920's and the 1960's, their working conditions did not change between the 1960's and 1978. Since in 1960 PTF's were entitled to annuities based on a hypothetical full-time salary, they must then have been "subject to call." Because their working conditions have not changed, they must still be "subject to call" and therefore entitled to the higher annuities.

The "subject to call" issue, however, is a mirage. The question here is not whether PTF's are "subject to call." Because OPM has never defined "subject to call," it would be impossible for OPM to test a retiree's right to an enhanced annuity by whether that employee was "subject to call." "Subject to call" is not a legislatively defined category that limits OPM's interpretation of the Act; rather, it is merely an umbrella term that describes the working conditions of employees whom OPM believes Congress intended to benefit through use of an enhanced "average pay" figure. See Brief for Appellees at 27.

Viewing OPM's interpretation in this light, it is clear that appellants cannot prevail simply by proving that the working conditions of PTF's have not changed since 1960. OPM could have changed its interpretation of the Act for any reason. See *American Chicle Co. v. United States*, 316 U.S. 450, 454-55 (1942); *Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d 1092, 1099-1100 (5th Cir. 1982); *Baker v. United States*, 614 F.2d 263, 267 (Ct. Cl. 1980). In contrast to agency decisions made pursuant to adjudication and legislative rulemaking, interpretative rules may be sustained on grounds other than those assigned by the agency. See K. Davis, *Administrative Law Text* § 16:07, at 329 (3d ed. 1972) (*Chenery* rule that agency action must stand or fall on its own rationale not applicable to actions that courts are as competent as agencies to take, such as interpreting a statute). The persuasiveness of an agency's reasons for reaching a particular interpretation, however, might affect the degree of deference we accord its views in the course of our own independent evaluation of the law's meaning. Therefore, if the agency's consideration of factors peculiarly within its expert knowledge would be useful to us in determining the correct interpretation of the law and if the agency's reasoning reveals an inadequate consideration of the proper factors, we may decline to make an independent evaluation at once and, instead, remand to the agency for further consideration. A remand

is not appropriate in this case, however, since the expertise that OPM can bring to bear in this context would not illuminate the legal issue before us. See note 9 and pp. 28-29 *infra*.

The parties' dispute over the nature of the present working conditions of PTF's and whether those conditions render PTF's "subject to call" is therefore immaterial. Even if appellants could prove at trial that the working conditions of PTF's have not changed over the past twenty years and that PTF's are as available as appellants claim, this proof would at most undermine OPM's justification for the change in its interpretation. It would not affect the propriety of the interpretation itself, which is a pure question of law. To prevail in this case appellants would have to show the impropriety of OPM's new method of annuity computation by showing Congress's intention that PTF annuities be computed using a hypothetical full-time salary. This they have not done. We turn now to our reasons for believing that OPM's new method of annuity computation is a correct interpretation of the Civil Service Retirement Act.

In essence we are faced with a choice between two conflicting interpretations of the Act made by the agency charged with its administration. A reviewing court may accord varying degrees of deference to an agency's interpretation of a statute. *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); see 2 K. Davis, *Administrative Law Treatise* § 7:13, at 60 (2d ed. 1979). Here, our review of the factors that determine the degree of deference we should give to an agency interpretation lead us to give no deference to either interpretation.⁹

⁹ First, neither annuity computation formula was developed contemporaneously with the retirement act. See *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933). The pre-1978 rule originated in 1928, eight years after the first act and two years after the 1926 revision of the act. Furthermore, the original computation formula was not an

The plain language of the Act makes it clear that Congress did not intend for a PTF's "average pay" to include pay which the PTF never earned—neither on the

independent construction of the act by its administrator. See p. 5 *supra*. Likewise, the new rule did not accompany a revision or re-enactment of the act and so cannot be a contemporaneous interpretation of statutory language. Second, the new rule is not longstanding, having been promulgated just five years ago. See *United States v. Leslie Salt Co.*, 350 U.S. 383, 395-96 (1956). Although the old annuity computation formula was longstanding, its long life cannot overcome our conviction that it is not as correct an interpretation of the Act as the new rule. See *Securities & Exchange Comm'n v. Sloan*, 436 U.S. 103, 117-18 (1978); *Aberdeen & Rockfish R.R. v. United States*, 682 F.2d 1092, 1099-1100 (5th Cir. 1982).

Third, neither rule required the exercise of agency expertise. See *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977). The administration of the retirement law does not involve the type of technical expertise so necessary in the administration of a regulatory statute. Cf. *A.G. Becker, Inc. v. Board of Governors*, 693 F.2d 136, 140 (D.C. Cir. 1982) (regulation of commercial banking). The degree of specificity with which Congress set out the annuity computation formulas in the statute indicate that the administrator's authority to vary the plain meaning of the prescribed formulas is very narrow. Cf. *id.* at 140 (scope of Federal Reserve Board's authority is broad). Fourth, our deference is not mandated by "the thoroughness evident in [the] consideration" of either the old or the new rule, nor by the "validity of [the agency's] reasoning" in adopting either of them. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Although the consideration given to adoption of the old rule is blurred by the mists of time, it seems that consideration was given largely, and perhaps entirely, to the Comptroller General's construction of a similar term in an unrelated statute. See p. 5 *supra*. The Secretary of the Interior apparently reasoned that similar terms in different statutes had to be interpreted identically. We do not find this reasoning sufficiently persuasive to engender deference to the Secretary's interpretation. OPM's consideration of the new rule also was less than compellingly thorough, encompassing no solicitation of information from APWU and no independent investigation of the representations of USPS. Deposition of Dorothy Mikules at 42, J.A. at 100. Furthermore, the reasoning underlying the new rule was fuzzy, see

basis of the employee's being "subject to call" nor on any other basis. There is no statutory provision for an enhanced "average pay" figure for employees working under certain conditions. "Average pay" is defined as "the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service." 5 U.S.C. § 8331(4) (1976). "Basic pay" is defined to include certain specified "pay," *id.* § 8331(3)(A)-(D), and to exclude, *inter alia*, "bonuses, allowances, overtime pay, military pay," *id.* § 8331(3).

Although the definition of "basic pay" does not expressly limit the term to pay actually earned, Congress's intention to do so is clear. From 1926 to 1956, the salary component of the annuity computation formula was "the average annual basic salary, pay, or compensation *received*" by the employee. Act of July 3, 1926, ch. 801, § 4, 44 Stat. 904, 907 (emphasis added); Act of May 29, 1930, ch. 349, § 4, 46 Stat. 468, 471; Act of Feb. 28, 1948, ch. 84, § 4, 62 Stat. 48, 49. The "received" language was omitted in the 1956 act, when a definitional section was added to the act. Civil Service Retirement Act Amendments of 1956, Pub. L. No. 854, § 401, 70 Stat. 736, 743. The 1956 act marked the first appearance of separate definitions for "average salary" and "basic salary," with the former defined as deriving from the latter. The sponsor of S. 2875, which was "embodied" in the 1956 act, 102 Cong. Rec. 13,670-71 (1956) (remarks of Sen. Johnston), noted on the Senate floor that the new definitions were not intended to change the meanings of terms "except as specifically noted in the report on the bill." *Id.* at 8655. The report on the bill by the Senate

generally pp. 7-9 *supra*, and, according to appellants, was based on an erroneous view of the facts. Thus, neither of these factors would call forth deference to the new rule. *Cf.* A.G. Becker, Inc. v. Board of Governors, 693 F.2d 136, 140-41 (D.C. Cir. 1982) (factors counsel great deference).

Committee on Post Office and Civil Service indicates no relevant change in the meanings of "average salary" or "basic salary." S. Rep. No. 1787, 84th Cong., 2d Sess. 10 (1956). That Congress intended the term "basic salary" still to mean only money actually received is shown by the report on the enacted bill, H.R. 7619, which states that the act defined "average salary" to require "that the annuities of all officers and employees . . . be based on an annual average of salary *received*." S. Rep. No. 2642, 84th Cong., 2d Sess. 5 (1956) (emphasis added). The change in terminology from "salary" to "pay" was made in 1966, when various federal personnel laws were codified and enacted as title 5 of the United States Code. Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378. Congress did not intend the change in terms to effect any change in meaning. H.R. Rep. No. 901, 89th Cong., 1st Sess. 1 (1965).

Additional evidence that "basic pay" includes only pay actually earned is found in other sections of the Act. The statute commands that each employing agency "shall deduct and withhold 7 percent of the basic pay of an employee" for contribution to the retirement fund. 5 U.S.C. § 8334(a)(1) (1976). Also, in defining "unfunded liability," the statute refers to "deductions to be withheld from the future basic pay of employees." *Id.* § 8331(19)(A) (1976 & Supp. V 1981). Similarly, section 8342(h) refers to "[a]mounts deducted and withheld from the basic pay of an employee." *Id.* § 8342(h) (1976). Obviously, deductions cannot be made from pay to which the employee never becomes entitled, such as the hypothetical pay a PTF would have earned if he or she had worked during the time he or she was available for work. Since Congress clearly intended "basic pay" to mean money actually received, from which deductions could be made and contributed to the retirement fund, Congress could not have intended hypothetical pay to be included in "average pay."

In addition, the Act's provision for enhanced service credit for PTF's demonstrates that Congress knew how to reward PTF's with increased annuities when it so desired. Since 1926, when Congress responded to the plight of substitutes who had to remain at the post office all day awaiting work, PTF's have received service credit for hours during which they do not actually work. Thus, PTF's already benefit from use of a greater-than-actual figure as the service component of the annuity computation formula. The omission of any similar provision in the Act for allowing salary credit for pay not actually earned is strong evidence of Congress's intent.

The history and structure of the Act also support our construction. The legislative history bristles with Congress's concern about the cost of the civil service retirement system to the federal government. *E.g.*, H.R. Rep. No. 1844, 84th Cong., 2d Sess. 46-48 (1956); 102 Cong. Rec. 8547-49 (1956) (remarks of Sen. Johnston); 59 Cong. Rec. 2503-08 (1920) (colloquy between Senators Pomerene and Sterling); *id.* at 2549-56 (remarks of Sen. Pomerene). In the 1920 act Congress rejected both noncontributory and wholly contributory retirement schemes, choosing instead to enact a partially contributory system. 59 Cong. Rec. 2503, 3395 (1920) (remarks of Sen. Sterling). Under this system, civil service retirement benefits are financed primarily through deductions from employees' pay, and any deficit between employee contributions and benefits payable is satisfied with federal funds.¹⁰ Congress intended for federal employees and the federal government to share equally in the cost of retirement benefits. S. Rep. No. 1787, 84th Cong., 2d Sess. 2, 3 (1956). The principle underlying this scheme is proportionality between employee contributions and

¹⁰ Since 1956 the federal government's share of retirement benefits has been financed chiefly through contemporaneous payment of a percentage of each employee's basic pay to the retirement fund. See 5 U.S.C. § 8334(a) (1) (1976).

retirement benefits. Congress has declared that one of the "essentials to proper financing of the retirement fund" is "employee contributions to the fund in amounts related to benefits provided." H.R. Rep. No. 2935, 84th Cong., 2d Sess. 33 (1956) (Conference Report). Maintenance of this proportionality requires the maintenance of proportionality between employees' actual contributions to the retirement fund and the service and salary credits included in the annuity computation formula. 5 U.S.C. § 8334(c), (d) (1976 & Supp. V 1981) (deposit of contributions to fund required before service credit may be allowed); 67 Cong. Rec. 9708-11 (1926) (colloquy on the Senate floor) (credit for service in legislative branch not allowed unless appropriate contribution made to fund). The pre-1978 method of PTF annuity computation violates the basic principle underlying the Act by allowing salary credit for pay from which no contribution to the retirement fund has been made. As a result, the federal government has had to bear a disproportionate share of the cost of PTF annuities, clearly contrary to Congress's intent.

Moreover, the old annuity computation method often resulted in a retiree's receiving more in retirement benefits than he or she received in pay while employed. See Retirement Records of Wilma M. Carter and Accompanying Affidavit of Craig Pettibone, Chief of OPM Office of Policy Development and Technical Services, J.A. at 219-52. In the Act Congress explicitly provided an annuity ceiling of eighty percent of an employee's "average pay." 5 U.S.C. § 8339(f)(1) (1976). One of the primary purposes of the retirement act is to encourage workers to remain in federal service. 102 Cong. Rec. 8657 (1956) (remarks of Sen. Johnston); *id.* at 8551-52 (remarks of Sen. Lehman); 94 Cong. Rec. 1743 (1948) (remarks of Sen. Baldwin). The eighty-percent annuity ceiling is clearly intended to avoid giving workers the retirement incentive of enabling them to receive more money after they retire than while they were work-

ing. By including unearned pay in the "average pay" figure, the old rule subverts Congress's intent by granting some retirees annuities in excess of their actual earnings while employed. The new rule neither encourages disproportionality between contributions and benefits nor rewards federal workers for retiring. It therefore better effectuates Congress's intent than did the old rule.

Moreover, the pre-1978 rule does not benefit from the presumption of congressional approval via re-enactment of the statute with no change in the interpreted language. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974). Re-enactment is a useful aid to discovering the intent of Congress, but it is not a conclusive indicator of congressional intent. *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941). Although the retirement act was re-enacted three times following adoption of the old annuity computation method in 1928—in 1930, 1948, and 1956—we find these re-enactments insufficiently indicative of congressional approval to overcome our reading of the statute and its legislative history, which is inconsistent with the pre-1978 interpretation.

One might expect Congress's attention to have been drawn to the Secretary's 1928 interpretation of "average salary" when the retirement law was completely revised and re-enacted in 1930, but there is absolutely no indication in the legislative history of the 1930 act that Congress knew about the use of a hypothetical full-time salary in computing substitutes' annuities, much less approved of it. The histories of the 1948 and 1956 retirement acts, as well as the 1970 Postal Reorganization Act, reveal a similar lack of congressional awareness of the old annuity computation formula. The Supreme Court has held that even when Congress knows, by virtue of a committee report, of the administrative interpretation, re-enactment of a statute with no change in the relevant language is insufficient to validate the interpretation in the face of its inconsistency with the plain

language of the act. *Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 119-22 (1978). We therefore decline to accept Congress's re-enactment of the retirement law with no awareness of the old annuity computation formula as an indication of congressional approval.

The new computation formula is consistent with the plain meaning of the term "average pay" in the Civil Service Retirement Act. It is also consistent with the Act's structure and purpose. We therefore hold that OPM's present PTF annuity computation method is a proper interpretation of the Act.

c. *Voluntary Rulemaking*

Even though OPM was not compelled to engage in notice and comment rulemaking before changing the PTF annuity computation method,¹¹ in our view rulemaking would have been advisable. The change struck at a very sensitive area: the pocketbooks of federal retirees. By directly reducing the annuities PTF's can expect to receive, the change threatened the employees' financial planning and economic security. The change overturned fifty years of administrative practice, and in the view of PTF's, unfairly eliminated the quid pro quo for their availability, on which they had relied in continuing to work for USPS. In addition, PTF's received no notice of the change, and this omission heightened the perception of unfairness.

Of course, agencies are free to adopt administrative procedures in excess of those required by the APA. Courts may encourage agencies to engage in voluntary

¹¹ Appellants argue that we should require rulemaking in this case as a matter of fairness. Brief for Appellants at 41-42. We decline to require OPM to engage in procedures not required by the APA. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978).

rulemaking whenever public participation would be beneficial to the administrative process. "Public rulemaking procedures increase the likelihood of administrative responsiveness to the needs and concerns of those affected. And the procedure for public participation tends to promote acquiescence in the result even when objections remain as to substance." *Guardian Federal Savings & Loan Association v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir. 1978). Certainly, this is a case in which rulemaking might have facilitated understanding and acceptance of the change by those whom it adversely affected.

III. CONCLUSION

We have held that the only factual dispute in this case—the nature of PTF working conditions and whether those conditions render PTF's "subject to call"—is immaterial to resolution of the legal issues. We have also held that because the actions of USPS and OPM in changing the PTF annuity computation formula did not violate the due process clause of the fifth amendment, the Postal Reorganization Act, the Civil Service Retirement Act, or the Administrative Procedure Act, appellees were entitled to judgment as a matter of law. The judgment of the district court is therefore

Affirmed.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 79-0874

AMERICAN POSTAL WORKERS UNION, *et al.*,
Plaintiffs

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants

[Filed Sep. 2, 1981]

MEMORANDUM

The plaintiffs brought this action for declaratory judgment challenging the change of method in which the United States Postal Service (USPS) certifies individual retirement records of part-time flexible (PTF) employees who retired after February 11, 1978. They contend that the change is in violation of the Postal Reorganization Act (Act), 39 U.S.C. § 101 *et seq.*, the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, and the Fifth Amendment to the United States Constitution.

The case is now before the Court on the defendants' motion for summary judgment and the plaintiffs' opposition thereto and motion for partial summary judgment.

I

A brief discussion of the history of PTF employment is necessary before addressing the specific issues before the Court.

Prior to the enactment of the Act in 1970, the Post Office Department employed individuals as substitute em-

ployees. These employees fell into two categories, career substitutes and temporary substitutes. The career substitutes were covered by the Civil Service Retirement law. See 5 U.S.C. §§ 8331(1), 8332(b)(1).

In the 1920's and the 1930's, most career substitute employees were employed on a "subject to call" basis. The career substitutes were required to report on virtually a daily basis and wait to be put to work. The employees were paid only for hours actually worked which was far less than the hours spent at the Post Office. Although the career substitutes earned far less than a full-time salary, their retirement annuities were based on a hypothetical full-time rate of pay. The use of hypothetical unearned full-time salary in computing the annuities was used because the career substitutes were "subject to call". Although the career substitutes retirement annuities were based upon a hypothetical full-time salary, the seven percent contribution of both the employees and USPS was based on actual earnings. See 5 U.S.C. § 8334.

Over the years the "subject to call" requirement imposed on career substitutes changed and, by 1960, those employees were required to report to the office only when specifically directed to work. Conway Aff. ¶ 4. Notwithstanding the elimination of the subject to call requirement, the Civil Service Commission (Commission) continued to compute retirement annuities for career substitutes based on a full year of service and a hypothetical full-time salary.

In addition to career substitutes, the Post Office Department also employed individuals as temporary substitutes. Temporary substitute appointments were divided into two categories, temporary appointments of limited duration and temporary appointments of indefinite duration. Neither category was subject to the service retirement law, 5 CFR § 831.201, or the subject to call requirement for career substitutes. Conway Aff. ¶ 3.

In 1971, the substitute appointments were eliminated pursuant to a collective bargaining agreement entered into by the USPS and the plaintiff, American Postal Workers Union (APWU). Career substitutes were converted to an appointment designated as part-time employees with a flexible schedule (PTF) and temporary substitutes serving under a time limited appointment were converted to a category designated as casual employees. The agreement also provided that PTF employees would serve under a guaranteed tour of duty of 2 or 4 hours per pay period depending on the size of the Post Office. Career substitutes converted to the PFT appointment continued to have annuities computed based on a hypothetical full-time salary.

In June 1973, temporary substitutes serving under appointments of indefinite duration were converted to career PTF appointments and with conversion to career appointments, they became subject to the Civil Service retirement law. Once these temporary substitutes were converted to career status, their annuities were calculated based on the hypothetical full-time salary.

With the elimination of the subject to call requirement, USPS officials believed that reliance on an unearned full-time salary for retirement purposes was improper. By letter dated March 11, 1977, the Postmaster General brought this matter to the attention of the Commission. The Commission resolved this question on January 12, 1978, with the issuance of Minute 7. The Commission agreed with the USPS that PTF employees were no longer subject to call. Since these employees served under a guaranteed tour of duty of 2 or 4 hours per pay period, the Commission concluded that they were more properly characterized as part-time employees with regular schedules of less than 40 hours per week. Thus, in accord with preexisting Commission regulations, the base pay figure used to compute the amount of annuity due to a retired PTF employee was altered to reflect the actual

pay of the PTF employee rather than the hypothetical full-time salary. Minute 7 was applied prospectively only to PFT employees who retired after February 11, 1978. Thus, for all PTF employees who retired after February 11, 1978, the USPS corrected its records, commencing with the July salary postings, to reflect the employees actual earnings rather than the hypothetical full-time pay which had not been earned. On January 12, 1978, the decision of the Commission was transmitted to USPS. Plaintiffs were not given notice of this change in the method of computing the annuities and had no opportunity to comment.

The defendants contend that the earlier method of computing retirement annuities, based on a hypothetical unearned full-time salary for employees who worked less than a full-time schedule, was improper under the law because the annuities such employees received were often far in excess of the employees' earnings and therefore disproportionate to the employees' contribution to the fund. Defendants argue that such a result was not intended by Congress. Deft. Memo. at 9. They contend that to allow postal employees to receive the annuities based upon full-time employment would result in the part-time employee "reap[ing] rewards out of all proportion to their actual work, unlike all other federal employees whether full or part-time, to the financial detriment of the public treasury".

To support their contentions, the defendants point to the case of plaintiff Wilma M. Carter who retired after February 11, 1978. During the last three years of her part-time PTF employment, Ms. Carter earned approximately \$355 per month. She now receives an annuity of approximately \$251 per month. However, if her annuity is computed based upon the hypothetical full-time salary for her last years of PTF employment, she would receive

an annuity of \$412 per month or \$57 more than she earned on her regular salary.¹

The plaintiffs contend that there are genuine issues of material fact as to whether the defendants violated the Act, specifically 39 U.S.C. § 1005, and as to whether the defendants violated the APA. They contend that the interpretation given to Minute 7 violates "judicial notions of fairness, the intent of the [APA]", and the Fifth Amendment.

The Court, after considering the arguments of the parties, concludes that there are no genuine issues of material fact.

II

The first question presented is whether the defendants were required to notify and give the PTF employees an opportunity to be heard on the changes in the method of computing the annuities. Plaintiffs contend that such action was mandated by the Fifth Amendment and the APA. The defendants counter by arguing that notice was not necessary since the PTF employees did not have a reasonable expectation that their retirement "would be based on the fiction that they earned full-time salary".

Initially, it is noted that no one disputes that if the plaintiffs' retirement is computed pursuant to the applicable statutes, the plaintiffs cannot prevail. To state it differently, if the annuities are computed under the statute, plaintiffs would not even recover what they are re-

¹ Ms. Carter's retirement pay reflects her actual earnings beginning in July of 1971. The \$251 per month she receives constitutes about 75% of her preretirement earnings. In general a federal employee with the same length of service as Ms. Carter would receive an annuity at the rate of approximately 45% of her salary. Ms. Carter receives 75% of her pre-retirement earnings based on the fact that the change made by the Commission is only applied to work performed subsequent to July 1971.

ceiving now. Any other federal employees with the same service and contributions to the fund would receive far less than what plaintiffs seek and indeed, even less than they now receive. Second, it is equally clear that the plaintiffs seek to receive annuities in an amount not commensurate with what they contributed to the fund. *See e.g.*, 5 U.S. C. § 8334.

The contention that plaintiffs were entitled to notice and a hearing before the method of computing the annuity was changed must be rejected. No property rights exist before the time the federal employee begins receiving an annuity. *Flemming v. Nestor*, 363 U.S. 603 (1960); *Dodge v. Board of Education*, 302 U.S. 74 (1937); *Kenny v. Hampton*, 155 U.S. App. D.C. 54, 475 F.2d 1323 (1973); *Goodley v. United States*, 441 F.2d 1175 (Ct. Cl. 1971); *Nordstrom v. United States*, 342 F.2d 55 (Ct. Cl. 1965); *Stouper v. Jones*, 109 U.S. App. D.C. 106, 284 F.2d 240 (1960); *Rafferty v. United States*, 210 F.2d 934 (3d Cir. 1954).

Here it is clear that on February 11, 1978, the plaintiffs annuity rights had not accrued or vested because they were not entitled to "immediate payment under the preexisting law". *Nordstrom v. United States*, *supra*, F.2d at 60. This being the case, the plaintiffs claim under the Fifth Amendment and the APA must fail.

III

Plaintiffs also contend that the Commission's decision interpreting the application of the Civil Service Retirement Law is subject to the rule making requirements of the APA.

This argument must also be rejected since it is quite clear that all that was involved concerning the change of method of computing retirement benefits was the interpretation of the existing statute and rules. Although the APA provides for formal rulemaking procedures requir-

ing notice and hearings, *see* 5 U.S.C. § 553, these requirements do not apply to "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice", 5 U.S.C. § 553(b)(A). A similar argument was rejected in *Kenny v. Hampton*, *supra*, U.S. App. D.C. at 56, F.2d at 1325.

IV

Those PTF employees who retired prior to February 11, 1978, had their annuities computed as though they had worked full-time, while those retiring after that date had their annuities computed based upon actual entitlement under the statute. Plaintiffs contend that the different treatment accorded to persons who are similarly situated amounts to a violation of equal protection.

While the Fifth Amendment does not contain an equal protection clause, the Supreme Court has held that the due process clause of the Fifth Amendment provides substantially the same protection as the Fourteenth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

The flaw with the plaintiffs' argument is that it assumes that the two groups of persons, those retiring on or before February 11, 1978 and those retiring thereafter, are similarly situated. They are not. The right of the group that retired on or before February 11, 1978, had vested under the statute while the rights of these plaintiffs had not. *See Part II, supra*. Moreover, to accept plaintiffs argument would be to hold that the annuity entitlements of federal employees cannot be changed prospectively.

The Court concludes that plaintiffs argument is without merit.

V

Finally, the plaintiffs argue that the defendants violated their collective bargaining agreement and 39 U.S.C.

§ 1005(f) by failing to engage in collective bargaining on the method of computing the annuities.

The purpose of the Act was to "[c]onvert the Post Office Department into an independent establishment in the Executive Branch of the Government freed from direct political pressures and endowed with the means of building a truly superior mail service". H.R. Rep. No. 91-1104, 91st Cong., 2nd Sess., *reprinted in* [1970] U.S. Code Cong. & Ad. News 3649,3650. Included within the Act was the framework for collective bargaining. See 39 U.S.C. §§ 1201-1209. The purpose of collective bargaining is to allow "postal workers in all parts of the country [to] bargain collectively with postal management over pay and working conditions". H.R. Rep. No. 91-1109, U.S. Code Cong. & Ad. News at 3650.

Congress provided in the statute:

(f) Compensation, benefits, and other terms and conditions of employment in effect immediately prior to the effective date of this section, whether provided by statute or by rules and regulations of the former Post Office Department or the executive branch of the Government of the United States, shall continue to apply to officers and employees of the Postal Service, until changed by the Postal Service in accordance with this chapter and chapter 12 of this title. Subject to the provisions of this chapter and chapter 12 of this title, the provisions of subchapter I of chapter 85 and chapters 87 and 89 of title 5 shall apply to officers and employees of the Postal Service, unless varied, added to, or substituted for, under this subsection. No variation, addition, or substitution with respect to fringe benefits shall result in a program of fringe benefits which on the whole is less favorable to the officers and employees than fringe benefits in effect on the effective date of this section, and as to officers and employees for whom there is a collective-bargaining representa-

tive, no such variation, addition, or substitution shall be made except by agreement between the collective-bargaining representative and the Postal Service.

39 U.S.C. § 1005(f).

The plaintiffs argue that the annuities fall within the definition of "compensation, benefits, and other terms and conditions of employment" that were in effect immediately prior to the effective date of the Act. Moreover, they argue that the language provides that "[n]o variation, addition, or substitution with respect to fringe benefits shall result in a program of fringe benefits which on the whole is less favorable to the . . . employees than fringe benefits in effect on the effective date of the [Act]" and that such changes as made here may not be made "except by agreement between the collective bargaining representative and the Postal Service". They contend that this language, when read together, effectively prohibited the defendants from changing the method of computation absent collective bargaining. After careful consideration of this argument, the Court concludes that it is without merit.

The Act provides that "[o]fficers and employees of the Postal Service . . . shall be covered by chapter 83 of title 5 relating to civil service retirement". 39 U.S.C. §§ 1005(d). The USPS is required to withhold "from pay" and "pay into the Civil Service Retirement and Disability Fund the amounts specified in [chapter 83 of title 5]". Under 5 U.S.C. § 8448(h) it is provided that the USPS shall be liable for any increase in the unfunded liability resulting from an employee-management agreement under the Act.²

² As was noted earlier, the individual plaintiffs, and presumably others similarly situated, receive annuities in excess of those received by other civil service retirees since the change in computation begins only after July 1971.

The plaintiffs and persons similarly situated may bargain for supplemental retirement benefits, but any agreement reached between the employees and USPS would not change the provisions of title 5, chapter 83 of the United States Code; rather it would result only in benefits *in addition to* those currently provided under the civil service retirement laws. Any holding that would give USPS employees additional benefits from the civil service retirement fund for which they had not contributed and greater than those benefits enjoyed by other civil service employees upon their retirement would be unfair and would deplete that fund from which all federal employees must share. Thus, any supplemental benefits is a matter between USPS and its employees only and cannot be drawn from the general civil service retirement fund.

Congress recognized this fact and specifically provided for retirement of USPS employees in 39 U.S.C. § 1005(d) while providing in a different section, Section 1005(f), for "compensation, benefits and other terms and conditions of employment" that would be subject to collective bargaining. The terms "compensation, benefits and other terms and conditions of employment" as used in Section 1005(f) does not include Civil Service retirement benefits. Moreover, in Section 1005(f), Congress referred to benefits which had *vested* immediately prior to the effective date of the Act. Here, the retirement benefits had not yet vested. See Part II, *supra*.

The legislative history supports this interpretation. There it is stated that Section 1005(d) "provides that postal employees shall be covered by the Civil Service retirement program, *as that program may from time to time be changed by law*," and also provides that postal employees may "bargain [] for *supplemental* retirement benefits". H.R. Rep. No. 91-1104, U.S. Code & Ad. News at 3677. Clearly under the terms of the statute and its legislative history, the supplemental benefits which may be subject to collective bargaining are in ad-

dition to and different from the Civil Service retirement benefits provided in Section 1005(d) and chapter 83 of title 5 of the United States Code.

The dispute here arises as the result of the method of computing retirement benefits, that is, an interpretation of the Civil Service retirement law, and is not based upon supplemental benefits which may be the subject of collective bargaining. Since the collective bargaining agreement does not apply to Civil Service retirement benefits, it follows that plaintiffs' contention that the defendants violated that agreement and/or 39 U.S.C. § 1005(f) is without merit.

In sum, the Court concludes that the defendants were not required to notify and give the FTF employees an opportunity to be heard on the changes in the method of computing their annuities, that the Commission's decision interpreting the application of the Civil Service retirement law was not subject to the rulemaking requirements of the APA, that defendants determination resulting in different treatment for those employees who retired on or before February 11, 1978, and those employees who retired after that date was not a violation of equal protection and finally that defendants did not violate the collective bargaining agreement and 39 U.S.C. § 1005(f). These determinations dispose of the relevant issues in this case and therefore defendants are now entitled to judgment as a matter of law.

Plaintiffs asked the Court to certify this case as a class action. As the result of the disposition of this case certification is not warranted.

An appropriate order has been entered.

Dated: September 2, 1981

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

MINUTES OF THE JANUARY 12, 1978 MEETING
OF THE UNITED STATES CIVIL SERVICE
COMMISSION

7. "HIGH 3" AVERAGE SALARY OF PART-TIME
EMPLOYEES—U.S. POSTAL SERVICE.

By letter of March 11, 1977, the Postmaster General called to the attention of the Commission what he viewed as a problem flowing from the method of determining a postal part-time flexible employee's "high 3" average salary for purposes of retirement annuity computation. By letter of November 29, 1977, the Postmaster General called the same problem to the attention of the Commission's new Chairman and urged Commission approval of a solution that had been worked out between the staffs of the two agencies. Basically, the problem stemmed from the fact that part-time flexible employees in third class offices were no longer considered "on call" and hence, the method of computing their "high 3" average salary for retirement purposes resulted in inflated annuities with the added result that the postal service, by agreement with the Commission, was being burdened with additional unfunded liability. Upon studying the problem, the Commissioners adopted the staff recommendations that such employees be more properly classified as part-time employees assigned to regular schedules of less than 40 hours per week; and further, that the annuity claims of those postal employees involved who retired between June 23, 1973 and the present be allowed to stand because they were allowed under the rules in effect at the time of their separation. (Action completed January 12, 1978.)

BRIOH LETTER NO. 10-12

Bureau of Retirement, Insurance, and Occupational
Health

LETTER

BRIOH LETTER NO. 10-12 Date: October 16, 1978

SUBJECT: Change in computing average salary for
part-time flexible schedule employees in the
Postal Service on and after February 11,
1978

FILING INSTRUCTIONS: Claims Manual Section
512.23 is revised by this letter. A Claims Manual In-
stallment will transmit new material when approved.

Effective July 20, 1971 all appointments as substitutes in the Postal Service were terminated and, under the provisions of the 1971 National Agreement between the Postal Service and the employee unions, all former substitutes were reappointed as part-time flexible schedule employees. The part-time flexible schedule employees are not "subject to call" on a full time basis as postal substitutes had been in the past. Instead, they work under a "guaranteed tour of duty" of 2 or 4 hours per pay period depending on the number of paid man years of employment in the regular work force. Because of the "guaranteed tour", the part-time flexible schedule employees are entitled to credit for the service from the beginning to ending date of the appointment, subject to the excess leave without pay rule.

The tour of duty for part-time flexible schedule employees is now, and has been since 1971, basically part-time; therefore, their average salary for annuity computation purposes is determined by multiplying the rate of pay by the guaranteed tour of duty of 2 or 4 hours per pay period. However, except in the smallest post offices, these employees generally work more than the guaranteed tour. In such cases, the actual earnings (not to exceed 2008 hours per year) is used for average salary purposes.

Since February 11, 1978, the Individual Retirement Records (SF 2806) certified by the Postal Data Centers have reflected in Column 4 the tour of duty for part-time flexible employees from 1971 to date of separation. If the employee worked more than the tour shown, an asterisk is placed by the retirement deductions for the year in question with an asterisk footnote "Additional Pay Status." Where such a period is involved in the high-3 average salary, the deductions will be converted to earnings.

The Postal Service will continue to furnish earnings only for temporary or indefinite flexible schedule employees, and the earnings will be used for average salary purposes for such employees prior to their conversion to career appointments.

This change affects only Postal Service employees on a part-time flexible schedule who are separated on or after February 11, 1978. The SF 2806 of all such employees on the rolls as February 11, 1978 and later will reflect the foregoing information and their average salary will be computed in accordance with these instructions regardless of the date of their initial appointment. However, the average salary is computed over any three consecutive years of creditable service and in determining the highest 3 years, service prior to July 20, 1971 must be considered since the annual basic salary for career substitutes at that time was based on the hourly rate multiplied by the number of hours in a work year.

This change does not affect the determination of life insurance coverage for part-time flexible schedule employees. For insurance purposes, annual pay will continue to be determined by multiplying the base rate of pay by the number of units in a 52 week work year, i.e., the hourly rate times 2008 hours.

/s/ Thomas A. Tinsley
THOMAS A. TINSLEY
Director

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA 79-874

AMERICAN POSTAL WORKERS UNION, *et al.*,
Plaintiffs

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Defendants

[Filed Aug. 31, 1981]

ORDER

This case comes before the Court on defendants' motion for summary judgment and plaintiffs' motion for partial summary judgment. After giving careful consideration to the memoranda and arguments of counsel the Court concludes, for the reasons set forth in the Memorandum to be filed, that the defendants' motion for summary judgment should be granted, and that the plaintiffs' motion for partial summary judgment should be denied.

In view of the above, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment is denied, and it is further

ORDERED that defendants' motion for summary judgment is granted, and it is further

ORDERED that this case is dismissed with prejudice.

Dated: August 28, 1981

/s/ John Garrett Penn
JOHN GARRETT PENN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982
Civil Action No. 79-00874
No. 81-2174

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Appellants

WILMA M. CARTER, *et al.*

v.

UNITED STATES POSTAL SERVICE, *et al.*

[Filed May 6, 1983]

Appeal from the United States District Court
for the District of Columbia

Before: Tamm and Scalia, Circuit Judges, and Oliver
Gasch,* Senior Judge, United States District
Court for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 6, 1983.

Opinion for the Court filed by Circuit Judge Tamm.

* Sitting by designation pursuant to 28 U.S.C. § 294(c).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 79-00874

No. 81-2174

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Appellant

WILMA M. CARTER, *et al.*

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Appellees

[Filed Jul. 14, 1983]

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey,
Wald, Mikva, Edwards, Ginsburg, Bork, Scalia,
Circuit Judges; and Gasch *, Senior District
Judge, U.S. District Court for the District of
Columbia

ORDER

The Suggestion for Rehearing *en banc* of Appellant, filed June 27, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

ORDERED by the Court *en banc* that the aforesaid
Suggestion is denied.

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Chief Judge Robinson did not participate in this Order.

No. 83-973

Office - Supreme Court, U.S.

FILED

FEB 17 1984

STEVAS.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals erred in basing its affirmation of the method for computing retirement annuities of some Postal Service workers on a ground different from that argued by respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-973

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
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v.

UNITED STATES POSTAL SERVICE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 707 F.2d 548. The opinion of the district court (Pet. App. 36a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50a) was entered on May 6, 1983. A petition for rehearing was denied on July 14, 1983 (Pet. App. 52a). On October 3, 1983, the Chief Justice entered an order extending the time to petition for a writ of certiorari to December 11, 1983. The petition was filed on Monday, December 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, the Office of Personnel Management (OPM) altered the method used to calculate the retirement benefits of substitute workers, or "part-time flexible" employees

(PTFs), of the Postal Service (Pet. App. 2a). The change diminished the expected annuities of some 113,000 future retirees (*ibid.*).

Congress first established the annuity system for postal employees in the Civil Service Retirement Act of 1920, ch. 195, 41 Stat. 614. That Act provided that the annuity would be calculated as a function of: (i) the number of years of federal service, and (ii) the average annual salary earned (Pet. App. 3a). Annuities for part-time employees, however, proved problematical because they worked far less than the time during which they had to be available for work (*id.* at 4a). Part-time employees had to be prepared to fill in as substitutes at all times, but were paid only when actually working for absent full-time employees.

In recognition of this situation Congress amended the Act in 1926 to provide that, for purposes of the annuity computation, postal substitutes were to be credited with a period of service that included their entire period of employment as substitutes, irrespective of the actual time worked. Act of July 3, 1926, ch. 801, § 5, 44 Stat. 907 (Pet. App. 4a-5a). Several years later another, and distinct, change was made by administrative practice rather than legislation. In accordance with a 1928 decision of the Comptroller General, subsequently adapted by the Secretary of the Interior to the computation of annuities (Pet. App. 5a), PTFs began to receive salary credit for pay not actually earned. The Secretary apparently reasoned that since substitutes were "subject to call" (*i.e.*, available for service) at times when they were not actually working, they should be credited for annuity purposes as if they had actually received salary during those times (*id.* at 7a-8a). Because of the perceived financial hardships confronting postal substitutes, PTFs thus received retirement benefits disproportionate to their contributions to the retirement fund.

In the ensuing 60 years Congress enacted several provisions affecting the postal workers' retirement system without ever focusing on the administrative practice of crediting substitutes for pay not actually earned. The 1956 Act reaffirmed the practice of crediting substitutes with periods of service in excess of time actually worked, but the Act did not address the related salary issue. Civil Service Retirement Act Amendments of 1956, ch. 804, SEC. 401 (§ 3(a)), 70 Stat. 745 (Pet. App. 5a). In passing the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, Congress removed postal employees from the competitive civil service but provided that they would still be covered by the civil service retirement system (Pet. App. 6a). OPM (the successor to the Civil Service Commission) therefore computed annuities for PTFs as had been done since 1928, including credit both for the entire period of service as a substitute, and for an annualized salary computed at the hourly rate at which substitutes were remunerated, rather than for the actual amount of salary received (Pet. App. 6a).

In January 1978, OPM changed its method of computing annuities to include only actual pay in determining substitutes' average annual salary (Pet. App. 6a). OPM made the decision at the behest of the Postal Service, which found that changes in the working conditions of substitutes had undermined the rationale for using the hypothetical full salary figure. The Postal Service concluded that unlike in the 1920's substitutes were now not "subject to call," partly because the 1975 collective bargaining agreement guaranteed PTFs a "tour of duty" of two or four hours per pay period, and partly because substitutes no longer needed to be available on such short notice (Pet. App. 9a).

2. In this action challenging OPM's decision to change the computation method, petitioner primarily alleged violations of the Postal Reorganization Act, the Fifth Amendment, and the Administrative Procedure Act (APA) (Pet.

App. 36a). The district court granted respondents' motion for summary judgment (*id.* at 36a-46a). It began by noting the reason for the change in the method of computation—that postal substitutes had not been “subject to call” since 1960 (*id.* at 37a). The court then held that the method of computation was not subject to collective bargaining, and therefore dismissed the Postal Reorganization Act claim (*id.* at 42a-46a). It also held that since the substitutes' annuity rights had not accrued or vested by the date OPM's change was implemented, the Fifth Amendment claim was not cognizable (*id.* at 40a-41a). Finally, the court found no merit to the APA claim, concluding that OPM's change in computation method was an interpretive rule exempt from the formal rulemaking requirements of the Act (*id.* at 41a-42a). See 5 U.S.C. 553(b)(A).

The court of appeals affirmed (Pet. App. 1a-35a). Although it agreed with the characterization of OPM's computational change as an interpretive rule (Pet. App. 21a-25a), the court of appeals proceeded to review the merits of the rule. It first held that in reviewing an interpretive rule, a court is free to substitute its own judgment for that of the agency charged with administering the statute (*id.* at 25a). The court proceeded to reject OPM's assessment that PTFs' right to an annuity based on the hypothetical salary figure turned on whether they were “subject to call” (*id.* at 26a). It nonetheless supported the computational change on the basis of its construction of the Civil Service Retirement Act, holding that Congress intended the “average pay” of a PTF to include only salary actually earned (*id.* at 28a-34a).

ARGUMENT

Petitioner argues that the court of appeals erred in deciding this case on the basis of its own understanding of the Civil Service Retirement Act, rather than allowing OPM,

the agency charged with administration and enforcement of the Act, to conduct further proceedings (Pet. 10-13). According to petitioner (*ibid.*), this failure violates the principle set forth in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). Petitioner also contends that the court of appeals departed from another accepted principle of administrative law, articulated in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), by refusing to defer to the agency's consistent practice of computing the salary component of retirement annuities on the basis of whether substitutes are "subject to call" (Pet. 13-18).

As we make clear below, there is no merit to either of these arguments about the deference due to agency action. This case thus ultimately involves a straightforward issue of statutory construction. On that question there is no division among the courts of appeals, and petitioner fails to demonstrate that the interpretation given to the Act by the court of appeals is incorrect. Moreover, even if the court's construction were erroneous, petitioner advances no reason why the agency's conclusion (that PTFs are no longer "subject to call")—accepted as correct by the district court—should not in any event be dispositive of its claims. Accordingly, further review is unwarranted.

1. Given the court of appeals' interpretation of the Civil Service Requirement Act, the principle announced in *SEC v. Chenery Corp.* has little to do with this case. It is true that OPM contended in the court of appeals that PTFs had no right to the inflated annuity they claimed, because they were no longer "subject to call." The court of appeals, by contrast, upheld OPM's action as required by a proper interpretation of the Act. Petitioner argues that the court of appeals, if it was not persuaded by the agency's justification for its action, should simply have reversed and awaited further proceedings by OPM.

But the court of appeals did not hold that the agency's determination (that PTFs were not "subject to call") was incorrect. Rather, it found that determination "immaterial" (Pet. App. 27a) in light of the statute's requirements—a point it correctly felt obliged to consider first. *Chenery* did hold (318 U.S. at 88) that

[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

Here, however, the straightforward issue of statutory construction decided by the court of appeals was not "a determination of policy or judgment which the agency alone is authorized to make." Cf. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, No. 82-799 (Nov. 29, 1983), slip op. 8 n.8 ("When an agency's decision is premised on its understanding of a specific congressional intent, * * * it engages in the quintessential judicial function of deciding what a statute means."). In performing the properly judicial task of determining congressional intent and interpreting the Act, the court of appeals concluded—as it was entitled to do—that the agency's action in recomputing PTF annuities was required by the statute.¹

The court of appeals determined that "Congress did not intend for a PTF's 'average pay' to include pay which the

¹As both lower courts held (Pet. App. 22a-23a, 41a-42a), OPM's change in the method of computing retirement benefits was an interpretive rather than a legislative rule. The court of appeals thus was entitled to look afresh at any assumptions the agency may have made about the meaning of the Act. See *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

PTF never earned—neither on the basis of the employee's being 'subject to call' nor on any other basis" (Pet. App. 28a-29a). In reaching that conclusion the court relied first on the language of the Act itself. It provides that eligible employees in the classified civil service shall receive an annuity based upon their years of federal service and average pay (5 U.S.C. 8339). The Act defines "average pay" as "the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of creditable service" (5 U.S.C. 8331(4)). "Basic pay" is defined to include certain specified pay, excluding amounts such as bonuses, allowances, overtime pay, and military pay (5 U.S.C. 8331(3)).

From the legislative history the court of appeals concluded that Congress intended "basic pay" to include only pay actually earned (Pet. App. 29a-31a). The 1926 amendment to the Act is perhaps most instructive. Congress heard extensive testimony about the predicament of postal substitutes (Pet. App. 4a), and to ameliorate the plight of part-time employees it amended the retirement law to require that a substitute's credited service include the entire period of his employment as a substitute, regardless of the actual time worked. Yet Congress chose only to alter the period-of-service component of the annuity computation, and left the salary component intact. From 1926 to 1956 the Act provided that computation of the salary component was to include "the average annual basic salary, pay, or compensation * * * received" by the employee. Act of July 3, 1926, ch. 801, § 4, 44 Stat. 907 (emphasis added); Act of May 29, 1930, ch. 349, § 4, 46 Stat. 471; Act of Feb. 28, 1948, ch. 84, § 4, 62 Stat. 49. Although the term "received" was replaced by the phrase "basic pay" in 1956, sponsors of the 1956 Act made it clear that the new definitions were not intended to change the meanings of the previous terms unless so stated in the committee reports. See 102 Cong. Rec. 8655 (1956) (remarks of Sen. Johnston). And the Senate Report in fact

specified that "the annuities of all officers and employees * * * be based on an annual average of basic salary *received* * * *." S. Rep. 2642, 84th Cong., 2d Sess. 5 (1956) (emphasis added).² Thus the language of the Act, taken in conjunction with the legislative history, plainly indicates that the only favor Congress intended to confer on substitute postal employees in the computation of annuities was a relaxed calculation of their "period of service," not an expansion of the "salary" component of their annuity determination.³

²Other provisions of the Act fortify the conclusion that the "basic pay" crucial to computation of annuities is limited to pay actually earned. For instance, the Act provides that each employing agency "should deduct and withhold 7 percent of the *basic pay* of an employee" for contribution to the retirement fund. 5 U.S.C. 8334(a)(1) (emphasis added). In addition, 5 U.S.C. 8342(h) refers to "[a]mounts deducted and withheld from the basic pay of an employee."

³Petitioner disputes the court of appeals' conclusion that the language of the Act is clear. It argues (Pet. 19 & n.11) that the term "average pay" * * * is defined as 'the largest annual *rate* resulting from averaging an employee's or Member's *rates of basic pay* in effect over any 3 consecutive years,' and that "[a] 'rate' of pay * * * is not necessarily the amount of pay [an employee] actually receives." But the term "rate" is used in the Act's definition of "average pay" (5 U.S.C. 8331(4)) because "average pay" signifies the amount received *per year*, and a rate is "a quantity [or] amount * * * of something measured per unit of something else." *Webster's New Collegiate Dictionary* 950 (1981).

The provision in OPM's *Federal Personnel Manual* cited by petitioner (Pet. 19 n.11) does state that "the rate of annual basic pay—not the pay actually received by the employee—is to be used * * *." But the point of that statement is not to authorize computation of annuities based on amounts never earned. See Office of Personnel Management, FPM Supplement 831-1, Inst. 27, at 58 (May 15, 1978) ("For example, an employee whose annual basic pay is \$8,000 but who is employed half-time would have a basic pay rate of \$4,000 per annum."). It is rather intended to make clear that some amounts that *are* earned are nevertheless to be *excluded* from "basic pay." See 5 U.S.C. 8331(3) (basic pay "does not include bonuses, allowances, overtime pay, military pay, pay given in addition to the base pay of the position as fixed by law or regulation" etc.).

b. Neither is review warranted by petitioner's related claim—that the court of appeals improperly refused to defer to OPM's consistent practice in computing the salary component of annuities. This Court's decisions in *Norwegian Nitrogen Products Co. v. United States*, *supra*, and *Bank America Corp. v. United States*, No. 81-1487 (June 8, 1983), do not lay down a per se rule that agency practices of long standing are binding on the courts—only that such practices are entitled to respect, particularly when adopted contemporaneously with the enactment of a statute and supported by other indicia of congressional intent. This case presents no deviation from that principle in conflict with the decisions of this Court.

At the outset it is worth emphasizing the obvious: here, as was true in *Norwegian Nitrogen Products Co.*, the result reached by the court of appeals is consistent with that urged by OPM and the Postal Service, the agencies most directly concerned with the interpretation of the Civil Service Retirement Act in this area. The agencies argued in the court of appeals that PTFs were *no longer* deserving of special treatment in computing the salary component of annuities, because the justification for such treatment (that PTFs were "subject to call") no longer existed. The court simply concluded that Congress *never* intended to grant PTFs such special treatment. This is hardly the kind of judicial disrespect for agency practices that *Norwegian Nitrogen Products Co.* addressed.

Moreover, the former position of OPM—though it was one of long standing—was not adopted contemporaneously with the passage of the Act (Pet. App. 27a-28a n.9). Cf. *Southeastern Community College v. Davis*, 442 U.S. 397, 412 n.11 (1979); *General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976). Contrast *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. at 315 ("[t]he practice has peculiar weight when it involves a contemporaneous

construction of a statute"). Nor, as the court of appeals found, did it spring from the responsible agency's independent determination of the demands of the Act (Pet. App. 5a). Rather, its principal source seemed to be a desire to achieve consistency with an earlier decision by the Comptroller General on another matter (*ibid.*). And unlike the administrative practice relied upon by this Court in *Bank America*, slip op. 9 & n.4, petitioner has cited no evidence that OPM's former practice was in any way reviewed or approved by Congress. See Pet. App. 5a-6a.

Finally, there is little merit to petitioner's argument that the court of appeals' interpretation of the Act unjustifiably ignores "postal substitutes' reliance throughout their working lives that their retirement benefits would not be reduced by a novel statutory construction" (Pet. 16). Petitioner does not here contend that PTFs have any right independent of the Act to annuity benefits bearing no relation to their earnings or contributions to the retirement fund. And the expectations of individual substitutes to which petitioner refers shed little additional light on the correct interpretation of the Act itself—the issue disputed by petitioner.⁴

⁴The court of appeals did not indicate what effect its opinion was to have on employees who have already retired. That is a matter it presumably left for further proceedings. We are informed by OPM that it does not intend to seek recovery of payments already made under the prior system of computation. See 5 U.S.C. 8346(b).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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FEBRUARY 1984

FILED

MAR 7 1984

ALEXANDER L. STEVAS
CLERK

No. 83-973

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT ¹

I.

(a) OPM's determination to compute the retirement benefits for postal substitutes ("PTF's") on the assumption that they are no longer "subject to call" concededly (Pet. 2a, 34a) contravenes "the important governmental interest of protecting individuals who planned their retirement in reasonable reliance on the law in effect prior to" that determination. See *Heckler v. Mathews*, — U.S. — (No. 82-1050, decided March 5, 1984), slip op. 21 (hereafter "*Heckler*"). For that determination,

¹ Throughout this Reply "Pet." will refer to the Petition for Certiorari, including its Appendix; "Br. Opp." will refer to the Brief for the Federal Respondents in Opposition.

which the Court of Appeals sustained on an entirely different legal theory, "reduc[ed] the annuities PTF's can expect to receive" and thereby "eliminated the *quid pro quo* for their availability, on which they had relied in continuing to work at USPS" (Pet. 34a; cf. *Heckler's* reaffirmation of the principle that "'[g]reat nations, like great men, should keep their word,' *Astrup v. INS*, 402 U.S. 509, 514, n.4 (1971)" (slip op. 19.)) *Heckler* held that the "protection of reasonable reliance interests is not only a legitimate governmental objective: it provides 'an exceedingly persuasive justification' for the statute at issue [t]here." *Id.*, slip op. 17, quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461. By the same token the utter disregard of that reliance interest by OPM and the court below is an "exceedingly persuasive justification" for review by this Court.

(b) The Brief in Opposition does not dispute the importance of this case. On the contrary, it indicates that the impact of the Court of Appeals' decision may extend beyond the 113,000 Postal Service employees (active when OPM issued its initial determination) who the Court of Appeals acknowledged are adversely affected thereby (Pet. 2a, 34a.). For, in its final footnote, the Brief in Opposition states:

The court of appeals did not indicate what effect its opinion was to have on employees who have already retired. That is a matter it presumably left for further proceedings. We are informed by OPM that it does not intend to seek recovery of payments already made under the prior system of computation. See 5 U.S.C. 8346(b). [Br. Opp. 10, n.4]

Thus, while disclaiming an intent to recoup from retirees "payments already made under the prior system of computation", respondent OPM reserves the right to reduce future payments to "employees who have already retired" by extending OPM's new computation method to those retirees. We do not accept respondents' self-serving as-

sertion that the Court of Appeals "presumably left [such reductions] for further proceedings." But it cannot be gainsaid that OPM has now informed this Court and many thousands of retirees that the change in computation, which "overturned 50 years of administrative practice" also jeopardizes the "financial planning and economic security" (Pet. 34a) of the retirees, who must wait anxiously while OPM decides whether to drop the other shoe, as the Postal Service—which set this entire process in motion—can be expected to urge in order to save even more money at the expense of its faithful long-time employees. (Pet. 6a-7a).²

In sum, the Court's recognition in *Heckler* of the important governmental interest in protecting retirement expectations, and respondents' pointed warning that OPM may seek to reduce the benefits of individuals who are already retired reinforces our original submission that review of the decision below is warranted because of its severely adverse impact on the large class of federal employees (Pet. 9-10).

II.

(a) The Brief in Opposition provides neither precedent nor reasoned argument to support the Court of Appeals' novel and far-reaching theory that *SEC v. Chenery Corp.*, 318 U.S. 80; 332 U.S. 194 does not apply to interpretive rulemaking. (Pet. 26a). Respondents' point that because the change in method "was an interpretive rather than a legislative rule" the Court of Appeals "was entitled to look afresh at any assumptions the agency may have made about the meaning of the Act" (Br. Opp. 6, n.1) pertains to the *scope of review* ("deferential" or *de novo*), and not to the question whether, in

² It will be recalled that OPM's predecessor, the Civil Service Commission (CSC), originally applied its new policy to employees in third-class post offices. This Postal Service then prevailed on the CSC's subordinate Bureau of Retirement, Insurance and Occupational Health to sweep another 100,000 employees under that ruling. See Pet. 7.

reviewing an administrative decision, the Court may affirm such a decision on grounds entirely different from those adopted by the agency. That these are entirely distinct issues of administrative law is not only obvious as a matter of logic, but is confirmed by the fact that neither of the decisions cited by respondents³ was an instance of a court affirming an administrative agency on a new ground, and thus neither decision so much as mentions *Chenery*.

Respondents, however, advance a different ground for disregarding the admonition of *Chenery*:

Given the court of appeals' interpretation of the Civil Service Retirement Act, the principle announced in *SEC v. Chenery Corp.* has little to do with this case. [Br. Opp. 5]

This assertion should be recognized for what it is—question-begging pure and simple. The Court of Appeals' interpretation of the Civil Service Retirement Act is not a "Given" in this Court—its correctness is challenged in the second question presented by the Petition (Pet. i, 13-22). Even more important, the Court of Appeals' interpretation of the Act was not a "Given" when that court was called to review the OPM's decision. Rather, under *Chenery* the only question properly before the court was whether OPM's decision could be sustained on the agency's premise, namely that the postal substitutes are no longer subject to call. Respondents' statement that the Court of Appeals "correctly felt obliged to consider first" an interpretation of the statute on which the agency's decision was not based, and which neither party argued, reverses both the mandate of *Chenery* and the normal course of adversary litigation.⁴

³ *General Electric Co. v. Gilbert*, 429 U.S. 125; *Skidmore v. Swift & Co.*, 323 U.S. 134.

⁴ Indeed, if the court is "obliged to consider" a rationale for decision other than that on which the agency's decision is based, what

It is ironic that having prevailed in the Court of Appeals, despite *Chenery*, on a theory inconsistent with that on which OPM's determination was based, respondents now argue to this Court that *Chenery* is inapplicable on a theory different from that of the Court of Appeals. To be sure, *Chenery* recognizes that a higher court may sustain the decision of a lower court on different grounds, and distinguishes judicial review of administrative determinations on just that basis, 318 U.S. at 88. But in the present posture of this case the court of appeals with the largest administrative review docket has determined that *Chenery* is inapplicable to a major category of administrative decisions—interpretive rules. That holding is indisputably of great significance, quite aside from the immediate context of this case.

is the point of this Court's repeated admonitions (as a corollary to *Chenery*) that reviewing courts may not rely on the *post hoc* rationalizations of appellate counsel? See, e.g., *Burlington Truck Lines v. ICC*, 371 U.S. 156, 168-169. At least, if agency counsel were free to argue such an alternative legal theory the party seeking review of the agency's action would have the opportunity to persuade the court before it decides the case that the legal theory is unsound—an opportunity denied to this petitioner.

The importance of strict adherence to the *Chenery* principle is illustrated by this case. The Court of Appeals refused to give weight to the Secretary of Interior's original interpretation of the Retirement Act on the ground that it was not "contemporaneous" with the 1926 amendment to the Act; the Court assumed that the Secretary's decision was made in 1928 and was based on a prior opinion of the Comptroller General. While we submit that this question of timing is immaterial because it misreads *Norwegian Nitrogen*, see Pet. 17-18, the decision below rests heavily on the foregoing assumption, which is reasserted as fact at Br. Opp. 2. Yet the Postal Service originally presented this sequence of events as a surmise, see Pet. 18, n. 10, quoting J.A. 202-203, and no evidence has been cited by either the Court of Appeals or the respondents in support thereof. If the issue of statutory interpretation had been considered by the agency in the first instance, or were now to be considered by it on remand in accordance with *Chenery*, the agency could search its records to determine the origins of the Secretary's interpretation, and thereby to refute or verify the court's assumption.

Moreover, the Brief in Opposition unwittingly confirms that the Court of Appeals' restriction of *Chenery* is indefensible. That holding should not be allowed to stand unreviewed.

(b) 1. Respondents' emphasis on what they term "the obvious: here, as was true in *Norwegian Nitrogen Products Co. [v. United States]*, 288 U.S. 294] the result reached by the court of appeals is consistent with that urged by OPM and the Postal Service, the agencies most directly concerned with the interpretation of the Civil Service Retirement Act in this area." (Br. Opp. 9). The foregoing proposition is not only far from "obvious", it is untrue except in the cynical and legally irrelevant sense that OPM and the Postal Service "won" and postal service employees "lost" under both OPM's decision and that of the Court of Appeals. In practical terms the differences in result are, to "emphasiz[e] the obvious" (*id.*), that 1) under the original interpretation of the Act the annuities to which the PTF's are entitled depend on whether OPM correctly decided that they are no longer "subject to call,"⁵ whereas under the Court of Appeals' construction this question of fact is "immaterial" (Pet. 27a); and 2) under the original interpretation OPM had not remotely suggested that it has the power to reduce past retirees' benefits (Br. Opp. 10, n.4). More fundamentally, the *Norwegian Nitrogen* principle is not a device for keeping score or identifying winners and losers; it is a guide to the decision of fairly debatable questions of statutory interpretation. Specifically, this principle brings to bear the accumulated insight of the officials "most directly concerned with the interpretation of the statute" (Br. Opp. 9) and accords due weight to the reliance which inevitably builds around

⁵ Petitioner urged in the court below that PTF's are entitled to a trial on that issue in this review proceeding; respondents, conceding the materiality of this issue, asserted that the PTF's would be afforded such a hearing by OPM. Under the Court of Appeals' decision the PTF's are denied a trial in any forum.

a longstanding practice (see Pet. 15-16). The Court of Appeals concededly reached an interpretation of the Civil Service Retirement Act inconsistent with over fifty years of administrative practice thereunder, and in so doing deliberately gave no weight whatsoever to the teachings afforded by that practice. Thus, since Justice Cardozo (and his followers on this Court) have been concerned with the correct interpretation of statutes (to which a longstanding practice is highly relevant) and not with the immediate satisfaction of result-oriented agencies, the decision below results from precisely "the kind of judicial disrespect for agency practices that *Norwegian Nitrogen Products Co.* addressed" (cf. Br. Opp. 9).

2. In the Petition (pp. 18-19) we pointed out that the Court of Appeals erred in its reading of the statutory language (Pet. 28a-30a) because the critical statutory term "average pay" is defined as "the largest annual rate resulting from averaging an employee's or Member's rates of basic pay in effect over any 3 consecutive years of credible service." 5 U.S.C. § 8331(4) (1976) (emphasis added). Respondents' defense of the Court of Appeals' reading gives a misleading impression of OPM's practice. The issue turns on whether, as the Court of Appeals believed and respondents now argue, for annuity purposes employees are credited only with earnings which they received. Under the general heading "d. Basic pay rate to be used" the *Federal Personnel Manual* states quite clearly under the subheading "(1) In general" that "In computing a high-3 average pay, the rate of annual basic pay—not the pay actually received by the employee—is to be used * * *" (*Federal Personnel Manual*, 831-1 Inst. 31 (Sept. 21, 1981), p. 60, quoted at Pet. 19, n.11.)

Although respondents assert that "the point of that statement is not to authorize computation of annuities based on amounts never earned" (Br. Opp. 8, n.3), the example which they give provides no support for this interpretation. Rather, it appears under subheading "(3) Part-

Time Rates" and sets forth the basic pay rate of part-time employees. "For example, an employee whose annual basic pay is \$8,000 but who is employed half-time would have a basic pay rate of \$4,000 per annum." (*Id.*, emphasis added). The part-time employees are paid according to that "basic pay rate," whether or not they actually receive that amount in any given year. Thus, to carry forward the respondents' example, if the half-time employee actually worked only three-eighths of the time during a year because of illness he would receive only \$3,000, but his annuity would be computed on the basis of his "basic pay rate" of \$4,000 per annum. Far from negating the principle of subparagraph (1) that the basic pay rate, rather than the amount received, is to be used, subparagraph (3) simply declares what the basic pay rate shall be for a class of part-time employees who, unlike the postal substitutes, are on a regular schedule.

3. At Pet. 15-16 we stressed, on the authority of *Bankamerica Corp. v. United States*, 103 S.Ct. 2266, 2272-2273, that a longstanding administrative practice builds up a reliance interest among the affected members of the public—there company directors—which the courts should not lightly overturn.⁶ Respondents' assertion that "the expectations of [113,000] individual substitutes to which petitioner refers shed little additional light on the correct interpretation of the Act itself" (Br. Opp. 10) is contrary to the teachings of *Bankamerica*. And *Heckler v. Matthews*, discussed above, strongly supports our submission that "the postal substitutes' reliance throughout

⁶ We of course do not contend that *Norwegian Nitrogen* or *Bank America* "lay down a per se rule that agency practices of long standing are binding on the courts" (Br. Opp. 9). Indeed, we expressly disavow such a contention (Pet. 18). Respondents prefer to demolish a straw man of their own creation to addressing our actual contentions that the court erred in stating that there were conflicting administrative interpretations of the Act (Pet. 16-17) and that the court's constrution of the Act misconceives and undermines the policies of the 1965 amendments to the Retirement Act (Pet. 20-22).

their working lives that their retirement benefits would not be reduced by a novel statutory construction is worthy of [considerable] respect." (Pet. 16).

CONCLUSION

For the foregoing reasons, and those stated in the Petition for a Writ of Certiorari, the Petition should be granted.

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